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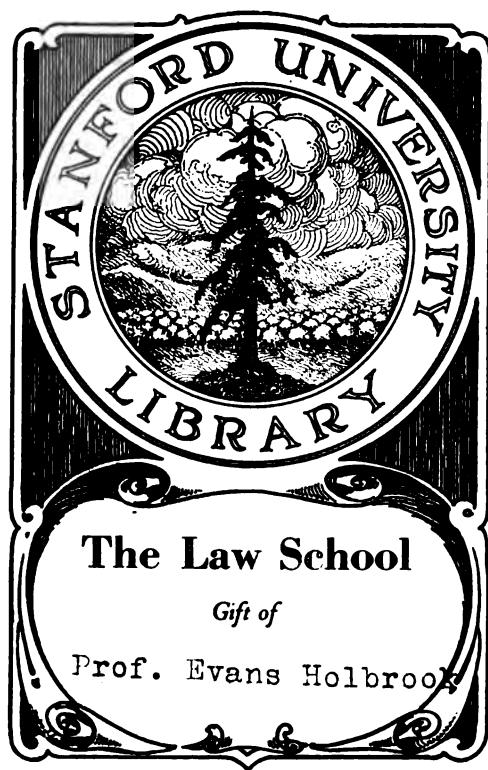
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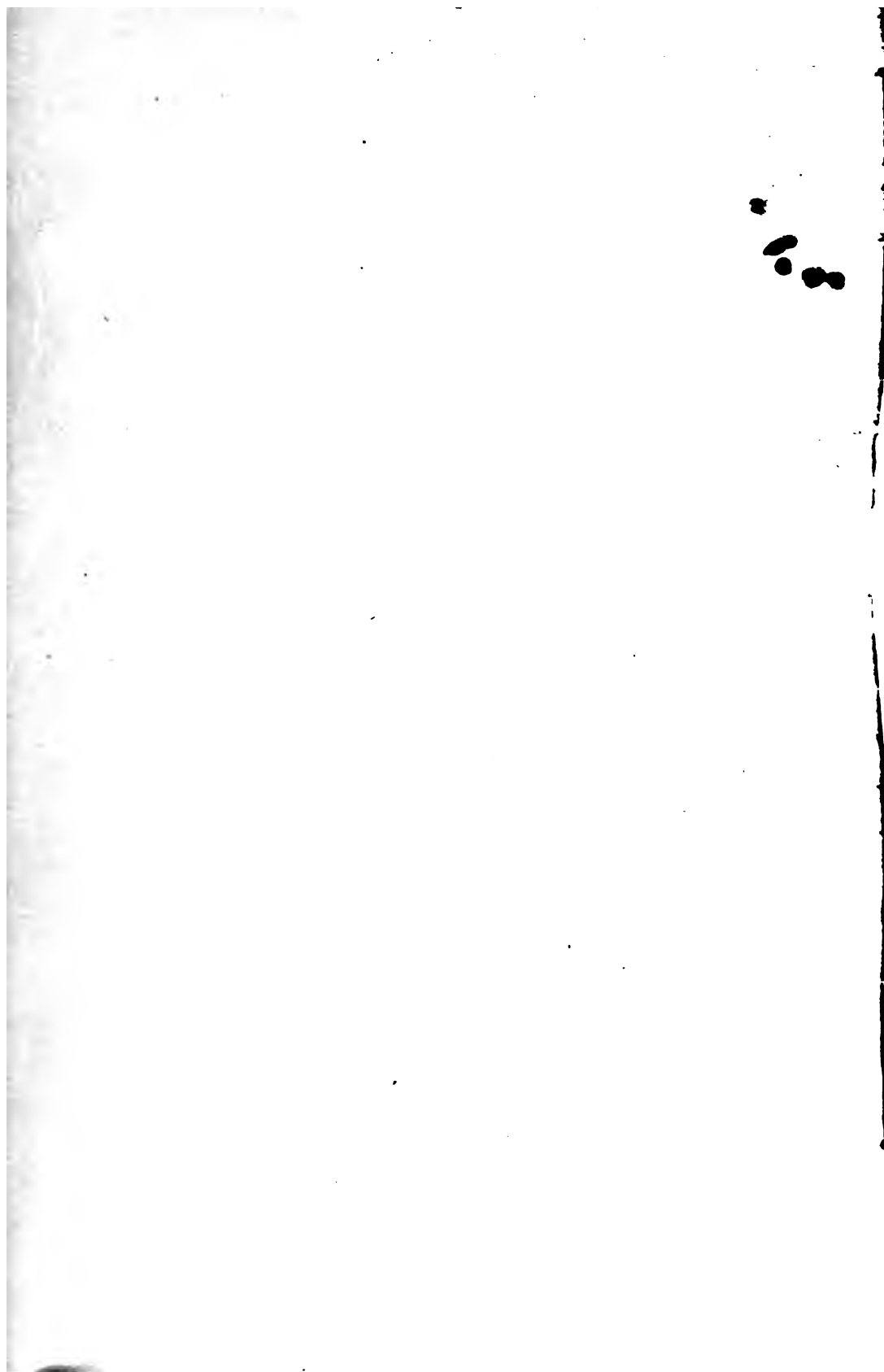


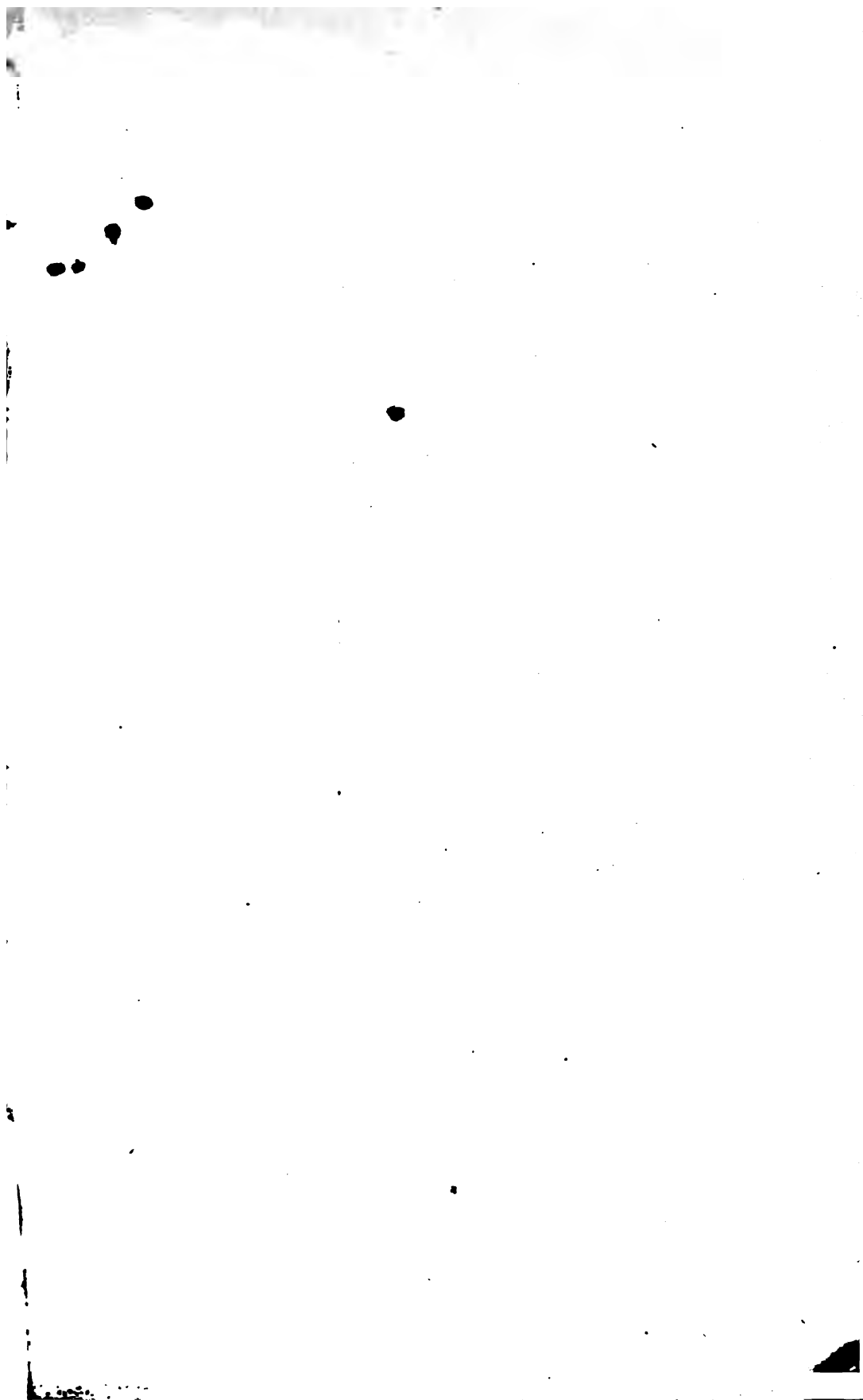
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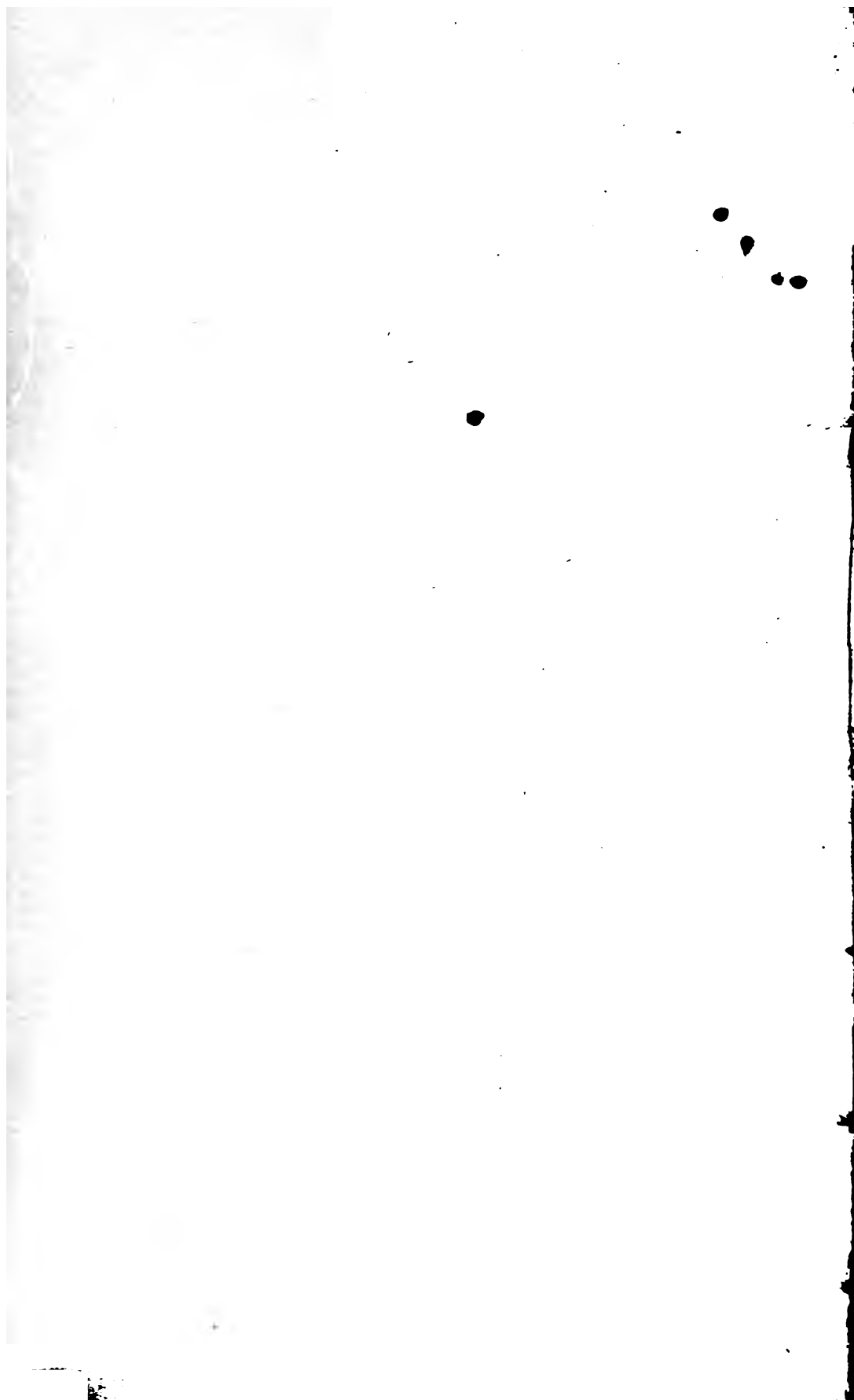
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A

TREATISE

ON THE

CIVIL JURISDICTION

OF

Justices of the Peace

IN THE

STATE OF NEW-YORK.

BY ESEK COWEN,
Counsellor at Law.

SECOND EDITION, REVISED BY

SIDNEY J. COWEN,
Counsellor at Law.

PART II.

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SECTION V.

OF CERTAIN RULES, WHICH RELATE TO PLEADING IN GENERAL.

Something has been said on this subject, in the introduction to the present chapter, by which it appears that the pleadings, in a justice's court, are to receive the utmost possible construction in favor of their validity. And where either the cause of action, or the defence is stated in plain language, and in words according to their ordinary import in conversation, this will be enough, though the strict rules of special pleading at the common law be violated.^(u) (1) Indeed, it is said (and with the greatest propriety) that special pleading in a justice's court is to be discountenanced, that it is calculated to mislead magistrates, and involve the proceedings of their courts in all the technical niceties of a court of record.^(v) Whenever, therefore, the supreme court can possibly intend, from the proceedings before them, that the merits were fairly tried in the court below, they will not examine or test by technical rules the formality of the pleadings.^(w) Under these strong intimations of the supreme court, I confess it has frequently been a matter of surprise to me, and the more so, on considering the nice and intricate nature of special pleading, that the legislature should still leave the defence in a justice's court, to be conducted by rules which have, in their application, so often embarrassed the greatest lawyers, and the ablest judges on the bench of the common law courts. "If," as an able writer on this subject observes, "a navigation often difficult in itself, and always made dangerous by bad pilots, has

(1) In addition to our remarks, and the authorities cited ante, 551, 552, a case recently decided by the supreme court, 13 Wen. 283, should be noticed. In that case, the court expressly adjudge the law to be, that if required by the parties, the pleadings in a justice's court must be drawn with legal accuracy, as well in point of *form as substance*; and if objected to *before the justice*, they are to be governed by the same rules as pleadings in other courts. And Ch. J. Savage, in delivering the opinion of the court, remarks, that "when a cause from a justice's court is brought up for review, and no objection was taken to the pleadings before the justice, this court will not readily listen to such an objection, particularly one of *form* merely. If it be good in substance, that is sufficient; and, no doubt, it was in reference to that principle that the revised statutes provide, that where a plaintiff declares orally, the justice shall enter in his docket the substance thereof. 2 R. S. 234, § 48, (p. 165, 2d ed.) The legislature did not thereby intend to say that a declaration before a justice should not be perfect in form as well as substance, if *so required*, at the time when put in." 13 Wen. 284.

(u) 3 Caines, 152.

(w) Id. 174.

(v) Id., and vid. id. 275 to 278.

made many wish that the course of the voyage was entirely changed,"(x) though directed by the learning and experience of the English bar, would it not be a prudent and necessary means of safety, in justices' courts, to shorten the whole process at once, by authorizing a full defence in almost all cases, under the general issue? True, such a provision ought not to be without its exceptions. Matters in abatement, which do not go to the merits of the action; a set-off, which is in the nature of a cross action; or a plea of title to lands in an action of trespass, which goes with the cause to another tribunal, &c. should, without doubt, remain to be introduced as at present. I find that I am not speaking without the authority of precedent. In Massachusetts, the legislature have gone far towards abolishing all special pleading on the part of the defendant, in a justice's court, by giving a much greater latitude of defence under the general issue, than has yet, I believe, been allowed to any court of record.(y) In many actions, there are already very few instances in which it is necessary to plead the defence specially. Take, for example, the actions of trover, assumpsit and case, which derive their popularity, even in the higher courts, from the great ease with which they are stated and defended on the record. Special pleading is, in many instances, mere form. Can any earthly reason be given, for instance, why, in trover, matters of defence may be given in evidence, under the general issue, when, in an action of trespass for the very same injury, the very same defence must be ushered into court, through the delicate process of a special plea, to be met by a replication perhaps equally special, and followed by a rejoinder, rebutter and surrebutter, all in consequence of a mere difference in the form of the action? But, in treating on this subject, we must take the doctrine as we find it. This doctrine must, in the nature of things, always exist. It must always be studied by those who mean to make themselves in the least conversant with actions and defences in courts of justice. The *form alone*, in which it is used in a justice's court, seems to be objectionable. The statute which authorizes the substitution of a *notice* in the place of a *special plea*,(z) thus obviating the necessity of a replication and subsequent pleadings, is but a slight modification of the difficulty attending special pleading. True, the plaintiff is not required to answer the notice, but still it must, if required, be drawn with as much accuracy and legal nicety as would be required in framing a special plea; and if not so drawn, the justice would undoubtedly be authorized to reject evidence to sustain it, on objection being

(x) Eunomus, 79.

(y) R. S. of Mass. 527, 528; and vid.

1 Mass. R. 234. 4 id. 672. 6 id. 1. 11 id. 313.

(z) 2 R. S. 277, § 24.

properly made. Such is the practice at the circuit, and I know of no reason why the same power may not be exercised by a justice.

1. WHAT CIRCUMSTANCES SHOULD BE STATED IN PLEADING.

In general, whatever circumstances are necessary to constitute the cause of complaint, or the ground of defence, must be stated in the pleadings, and all beyond is mere surplusage. Facts only are to be stated, and not arguments, or inferences, or matters of law.^(a) Thus, if I were to sue a constable for suffering a man to escape on a warrant at my suit, it would not be enough for me in declaring, to state to the justice *that the defendant is liable for an escape from a warrant in my favor*; for this would be a mere conclusion of law; and though, on certiorari after issue joined, and the merits fairly tried, the judgment might not be reversed for that reason,^(b) yet the defendant might demur to my declaration, and if the justice should overrule the demurrer, it would be error. It is therefore strictly necessary for me to state, *that I sued out a warrant before such a magistrate, (setting it forth in substance,) which warrant was delivered to the defendant, being a constable of the county, that he arrested the defendant by virtue of such warrant, and suffered him to escape and go at large, to my damage, &c.* And I may be required to set forth the time and place of each of these acts.^(c) This time and place are, however, generally matter of form only; and unless the time be stated, as *the date* or *other part* of an instrument or contract, or the place appear upon the face of a writing set forth in pleading, any proper time or place, varying from the one stated in pleading, may be proved upon the trial, and will sustain the declaration or other pleading, as effectually, as though the allegation and proof agreed in terms.

And so, in the defence, suppose the constable admits the escape, but has by agreement given the plaintiff his watch to pay him the damages, called in law an *accord and satisfaction*, which is a good defence, but the constable, in pleading this defence, should merely say, *he has settled with the plaintiff*, without showing how. This is nothing more than a conclusion of law, is consequently bad, and the plaintiff might demur to the plea. The defendant should state the facts which constitute his defence, viz. *that the plaintiff agreed with him to accept a certain watch in satisfaction of his damages, on account of the escape; and that in pursu-*

^(a) 1 Chit. Pl. 196. Vid. Gould's Pl. ch. 8, § 12.

^(b) 3 Caines, 152. id. 275. 1 John. 276. 2 id. 210. Vid. ante, 550, 551.

^(c) 14 John. 369. Vid. 2 Cowen, 437, 438, and n. a. 3 Wen. 75. 12 id. 375.

ance of such agreement, the watch was delivered to and accepted by the plaintiff in full satisfaction of such damages, with the time when and the place where this was done.

2. HOW STATUTES ARE TO BE PLEADED.

Public statutes, that is to say, such as concern the whole state, need not be set forth in pleading; but *private acts*, that is to say, such as relate to a corporation or single individual, must be set forth, at least, in substance, the same as a private deed or charter, or the record of a court of justice; and so of the *by-laws* of a *town, village* or other *corporation*. Not only must a private statute or by-law, (or at least, so much of it as is material to the case,) be *recited* by the party complaining or defending under it, but the *facts* which bring the case within the statute or by-law, must be stated. These are the general rules, applicable to perhaps a majority of the cases where statutes are required to be pleaded. After stating the facts, which bring the case within the statute, if a public one, it is usual to conclude with the general allegation, "contrary to the form of the statute," (or "by force of the statute,") in such case made and provided;" if a private statute, no such conclusion is necessary; the recital of its provisions forms a part of the facts set forth in the pleading, and is sufficient. It is worthy of remark, in this connexion, that the revised statutes have greatly simplified the form of pleading in suits for the recovery of statute penalties and forfeitures, by requiring only that a general indebtedness should be stated in the declaration, concluding with a reference to the statute by which the penalty or forfeiture is given or created; to which the defendant may plead the general issue, and give in evidence any special matter which, if pleaded, would be a bar to the action.(d) It will be seen that these provisions apply only to *penal statutes*, so that still, cases will be constantly arising, in which other statutes, both public and private, may form an important part of the complaint or defence, and therefore necessary to be pleaded. Many acts of the legislature, though in their nature private acts, have a clause declaring that they shall be public acts, &c. in which case they are to be treated as such, both in the pleadings and evidence.(1)

(1) PUBLIC AND PRIVATE ACTS IN LEGAL LANGUAGE.—1. Acts are deemed to be *public* and *general acts*, which the judges will take notice of without pleading, viz. acts concerning all great officers, or all officers in general of any other class, such as sheriffs, &c. Acts concerning trade in general, or any specific trade; acts concerning all persons generally, though it be a special or particular thing, such as a statute concerning the circuit court, oyer and terminer, &c. or

3. THE DECLARATION NEED NOT NEGATIVE THE DEFENCE.

Matter of defence to the plaintiff's action, need not be negated by him in declaring, or in any way alluded to, (except the common breach, as non-payment in an action of debt, or non-payment or non-performance of the defendant's promise in an action of assumpsit, or of his covenant in an action of covenant,) for matter of defence should be left to be pleaded or otherwise, according to its nature, stated and proved on the part of the defendant. For example, the plaintiff, after having stated his claim, need not go on to deny that he has released it, that it is barred by the statute of limitations or other cause, for if there be these, or any other matter, in defeasance of the plaintiff's action, it must be shown by the defendant.(e)

In declaring upon statutes, where there is an exception in the enacting clause, the plaintiff must expressly allege and show the defendant not to be within such exception; but if there be an exception or proviso, in a subsequent part of the statute, the defendant must show it himself by way of defence. This rule is now of little practical utility, as the general form of declarations in these cases given by the revised statutes(f) requires no special averments whatever. Notwithstanding the provisions of the statute, however, there can be no doubt that, if the plaintiff prefer, he may still adopt the old form of declaring, in which case a strict observance of this rule will be necessary; and it applies to all the other pleadings in a cause, as well as the declaration.(g) The best application of this rule that can be given, was contained in the first edition of this work; and although the act there referred to, has, in the revised statutes, undergone material alterations not only in its language but in the substance of its provisions, yet it is worthy of repetition here, merely as an illustration of the above rule. The fourteenth section of the "act to lay a duty on strong liquors, and for regulating inns and taverns,"(h) provides, that if any tavern keeper shall take a note to secure more than one

woods and forests, &c. &c. 2. *Private acts*, are those which concern only a particular species, thing or person, of which the judges will not take notice without pleading them, viz. acts relating to any particular place, or to divers particular towns, or to one or divers particular counties, or to certain colleges only in the university. In a general act, there may be a private clause, and a private act, if recognized by a public act, must, afterwards, be noticed by the courts as such. Vid Bac. Abr. tit. Statute, (F), Phila. ed.

It seems that an act incorporating a bank, without declaring the law to be a public statute, is a public act. 3 Cowen, 662, 684.

(e) 1 Chit. Pl. 205, 206. 2 John. 415.
416. 5 id. 168.

(g) Vid. 3 John. 438. 4 id. 304.
(h) 1 R. L. of 1813, p. 180.

(f) 2 R. S. 395, § 10, 11, 12.

dollar and twenty-five cents, for strong liquors drank at his house, from any person, other than *travellers*, he shall forfeit a penalty equal to the amount of the note. Now, in an action for the penalty under that act, the plaintiff must have set forth, not only the facts necessary, in the first instance, to maintain his suit, viz. that the defendant was a tavern keeper, and took the note of such a person, for a sum exceeding one dollar and twenty-five cents, for the purpose forbidden by the act, but he must have gone farther, and denied in his declaration, that the person who gave such note, was a traveller; for there the exception, *other than travellers*, is contained in the *very clause*, which gives the *penalty*. But after the act goes through a description of the offence, there is a proviso or exception, *that it shall not extend to the taking a note of a lodger in the tavern keeper's house*, but that this shall be lawful. Now it was not necessary for the plaintiff to deny, that the person trusted was a lodger, but if such was the case, it was a matter of defence for the defendant to show on his part. The present statute⁽ⁱ⁾ extends the *exception in the enacting clause* to both *travellers* and *lodgers*, so that in declaring for the penalty, in the old form, it would be necessary to deny that the person who gave the note was either a traveller or lodger.

4. THE LAW SOMETIMES ALLOWS A FICTION IN PLEADING.

The general rule is, that facts must be stated, yet the law sometimes allows of fictions in pleading, for the sole purpose of advancing justice; and being allowed for this purpose, they require, on the one hand, no proof, and on the other, they cannot be traversed; since to require the one or permit the other, would defeat the end for which they were designed. Thus, in *trover*, the plaintiff always declares, that he lost the goods in question, and that the defendant found them, which facts the defendant is not allowed to deny; and on the trial, though the plaintiff show that he delivered the goods to the defendant to use, and that he had refused to re-deliver them, after the time of the bailment had expired, or that they came to his hands in any other way besides that of losing and finding, and are wrongfully converted, he must recover; for the plaintiff, in *trover*, always declares on a *loss* and *finding*, and then proves what kind of taking he pleases.^(j) So in the action of *assumpsit*, if there be an actual *debt*, or *legal liability*, by simple contract, on the part of the defendant, but, as is frequently the case, no *express* undertaking to pay the debt, yet the plaintiff, in his declaration, must regularly allege a

(i) 1 R. S. 678, § 11.

(j) 1 Chit. Pl. 207. Gould's Pl. ch 3, § 18.

promise; for as the action of assumpsit is, in its form and structure, adapted to no other demands than those arising upon promises, the law, where no promise has actually been made, *implies* or *presumes* one, from the fact of the defendant's being indebted, for the purpose of entitling the plaintiff to this beneficial action, instead of the precarious and less remedial action of debt, which was anciently his only remedy in such a case. But whenever the promise is thus implied, it is declared upon as an *express* one, and upon the face of the pleading is always taken to be *express*.(k)

5. THE PLEADING MUST NOT BE DOUBLE.

It is also a rule equally affecting declarations, pleas, replications, &c. that the pleading must not be double, that is, that no single count or plea shall contain two or more matters, either of which would, *in itself*, independently of the other, be a sufficient ground of action or defence. Thus, a claim for a trespass on *lands* and *goods*, in an action of trespass, or a claim on a *promissory note*, and for *goods sold* in assumpsit, cannot be huddled together in one count, but should be stated in two distinct counts in the same declaration, for each is a good and sufficient cause of action independent of the other. So a release and payment, cannot be pleaded in the same plea, but should be stated in two distinct pleas, and so of a thousand cases which might be supposed. But this *duplicity* in pleading is only matter of form, and will endure, unless objected to by special demurrer.(l)

SECTION VI.

OF THE MODE OF STATING FACTS.

1. The pleadings in a justice's court may be either verbal or written, at the discretion of the party making the same, except in the case of a plea of title to land. When written, they must be filed, and remain with the justice; when verbal, the justice is required to enter the substance thereof in his docket.(m) It is advisable, in all cases where the subject of the suit is contested, to reduce the pleadings to writing, and if the op-

(k) Id. § 19.

(l) 1 Chit. Pl. 208. Gould's Pl. ch. 8,

§ 1, 3, &c. Grah. Prac. 2d ed. 207, 208.

(m) 2 R. S. 165, § 48.

posite side will proceed by *parol*, and his pleading is defective, to take advantage of such defect by demurrer, until it have sufficient substance, legally to require an answer. This course will shut out a good deal of after controversy, about the points in question in the cause, as well as the nature of the action. Some declarations and pleas are so loose, as neither to give a character to the action on the one hand, or to disclose the nature of the defence on the other. This ought not to be tolerated, unless the party entitled to object, is *willing* to put his rights afloat upon such a shoreless ocean, by answering over. If the pleading demurred to be insufficient, the justice should so decide, and in general, suffer the party to amend from time to time, until it is perfect. If the demurrer be not properly taken, he should, upon overruling it, generally suffer the party demurring to answer over; (n) though this he is not bound to do; however, the exercise of his discretion, in this particular, is subject to review by *certiorari*; and in one case, where the justice returned that the defendant admitted (independently of his demurrer,) all the facts in the declaration, and on this ground refused him liberty to plead on a decision against the demurrer, the supreme court affirmed the judgment of the justice. (o) If the justice decide erroneously against the demurrer, though he permit the party to answer over and go to trial, the judgment will, it seems, be reversed for the error in deciding the demurrer. (p) The justice should, therefore, be satisfied that the demurrer is clearly ill taken, or allow it, and grant the party leave to amend the pleading demurred to. This course will also improve the certainty of the pleadings before him, which is, in general, a result much to be desired. Particularity and certainty in the pleadings are of the utmost importance, in many instances, in order to avoid subsequent disputes about what was admitted, what denied, the nature of the action, the character of the defence, and the testimony admissible under the issue on either side, &c. &c., and much controversy is many times avoided, by justices being careful to exact a due degree of accuracy from the parties, in their allegations. If this be waived, however, he has nothing to do with it. He cannot himself demur. We have seen that the supreme court and courts of common pleas never require the same technical precision and formality in pleadings before a justice, as in those courts, and, on review by appeal or *certiorari*, they are to determine according to the very right of the case. (q) But where the essential rights of the parties depend upon the pleadings

(n) Vid. 10 Wen. 370, 372.

(o) Id.

(p) 14 John. 369, 370. 3 Caines, 137,

8. 13 Wen. 233, 4.

(q) Ante, 459, 550, 551. 5 John. 122.
2 Wen. 586.

exhibited in a justice's court, they will be governed by them, notwithstanding the latitude allowed in reference to such pleadings.(r) Words, as they are understood in ordinary use, are always the proper language of pleading in a justice's court, and they are to be taken in that sense in which they are understood in common parlance.(s) Thus, in declaring on the warranty of a horse, the plaintiff stated that he "*let the defendant have a horse and a note of hand of sixteen dollars, in consideration whereof the defendant let the plaintiff have a horse, which he warranted to be a sound good working horse, whereas he was totally unfit for all manner of business.*" Now the word LET, in law, would mean a bailment, and not a sale or exchange, as was evidently intended by the plaintiff in this declaration; but the meaning of the word as it is used here, being, in common language, among people, a sale or exchange, the supreme court, for this reason, held the declaration sufficient.(t)

2. The principal rule as to the mode of stating facts, is, that they must be set forth with *certainty*, by which term is understood a clear and distinct statement of the facts, which constitute the cause of action or ground of defence, so that they may be understood by the party who is to answer them, and by the court or jury who are to try them, and by the court who is to give judgment.(u) This rule will be illustrated, when I come to speak of the qualities of declarations, and other parts of pleadings. Let it suffice to state here, that when the facts are not really stated with sufficient certainty, the introduction of the word *certain*, is of no avail. Thus, a declaration for a sum of money, forfeited *by a certain by-law*, without setting it forth, or for a sum of money due *on a certain bond*, without stating it, is insufficient; so for wages, in consideration that the plaintiff would go *a certain voyage*, without stating the voyage. So, where the declaration was, "that the plaintiff had sold to the defendant *a certain horse*, at, and for *a certain quantity of certain oil*, to be delivered within *a certain time*, which had elapsed," would be bad on demurrer. And a justification in trespass against a constable, by pleading that he took the property claimed by virtue of *a certain attachment*, or *a certain execution*, without setting it forth, would be insufficient. So, the words *duly, lawfully, sufficiently, &c.*, without showing the matter of fact, are seldom of any avail in pleading.(v) But the above defects, in a justice's court, must be taken advantage of by demurrer; for if judg-

(r) 7 Wen. 453.

(s) 3 Caines, 152.

(t) Id.

(u) Vid. 1 Chit. Pl. 212, 213. Vid. 9 John. 291. 2 id. 12. 8 Taunt. 423.

(v) Vid. 1 Chit. Pl. 216. Vid. also 4 Taunt. 34. 9 John. 349. But Vid. 7 id. 249.

ment be given upon such a declaration in the court below, it would not be reversed, unless it appear that the objection was made there. Thus, a declaration, *for the defendant's not fulfilling a contract for a certain lot of lease land, lying in G.*, was held sufficient, in a justice's court, not having been demurred to in the court below.(w)

To these rules, affecting the mode of stating facts, may be added the following, viz: that the facts stated must not be insensible or repugnant; nor ambiguous or doubtful in meaning; nor argumentative; nor in the alternative; nor by way of recital, but positive; and should be stated according to their legal effect and operation.(x)

SECTION VII.

RULES OF CONSTRUCTION.

On this subject, I think I am warranted in saying, from the reasons and authorities already adduced, that, *contrary* to the rule of the common law courts, every thing in a justice's court shall be taken most strongly in favor of the party pleading it, or rather, if the meaning of the words used be doubtful or equivocal, they shall be construed most strongly in favor of the party using them. The language of pleading, in all courts, is to have a reasonable intendment and construction; and where a matter is capable of different meanings, that shall be taken which will support the pleading, and not the other, which would defeat it; and when the meaning either of words or sentences is doubtful, the context may be resorted to, that is, what precedes or follows the ambiguous matter, either in the pleading itself, which is objected to, or any which precede it, in order to give it a consistent or certain meaning. If the sense be clear, nice exceptions ought not to be regarded.(y)

(w) 3 Caines, 219.
(x) Vid. 1 Chit. Pl. 216, 217.

(y) 1 Chit. Pl. 217, 218.

SECTION VIII.

DIVISION OF PLEADINGS.

This is into two heads. 1. *Regular*. 2. *Irregular*.

1. *Regular pleadings* are those which arise in the ordinary course of a suit, and are, 1. The *declaration* or *count*. 2. The *plea*. 3. The *replication*. 4. The *rejoinder*. 5. The *surrejoinder*. 6. The *rebutter*. 7. The *surrebutter*. 8. *Pleas puis darrien continuance*.

2. *Irregular*, are those which are occasioned by the mistakes in pleading on either side, being in a justice's court but another name for *general* and *special demurrers*.

An example of regular pleading, in which the allegations of the parties are conducted to a surrebutter.

IN TRESPASS.

JUSTICE'S COURT.

<i>James Jackson</i>	}	DECLARATION.
v.		
<i>Richard Roe.</i>		

SARATOGA COUNTY, ss. The plaintiff complains of the defendant for this, to wit, that on the last day of August, A. D. 1833, he, the defendant, with force and arms, &c., the close of the plaintiff situate in the town of Saratoga Springs, in the said county, did break and enter, and by his servants, horses and cattle, then and there trod down, subverted and destroyed the grass and other vegetables of the plaintiff then and there growing; and other wrongs to the plaintiff then and there did, against the peace of the people of the state of New-York, and to the damage of the plaintiff of \$50.

PLEA.

The defendant says, that the plaintiff ought not to have or maintain his said action against him, because he says that the close mentioned in the plaintiff's declaration, is a certain close situate in the said town of Saratoga Springs, called the *pasture*; and that the plaintiff did, at the said time, when, &c. to wit, at the said town of Saratoga Springs, in the said county, give the defendant leave and license to turn and drive his said

horses and cattle into the said close of the plaintiff, to be fed and kept there; wherefore the defendant did, at the said time, when, &c., by his servants aforesaid, turn and drive his said horses and cattle into the said close, and thereby did tread down, subvert and destroy the grass and other vegetables of the plaintiff, then and there growing, as he lawfully might for the cause aforesaid, to wit, at the town of Saratoga Springs, in the county aforesaid, which are the same trespasses whereof the plaintiff above complains; wherefore he prays judgment, and that the plaintiff may be barred from having and maintaining his said action thereof against him the defendant.

REPLICATION.

The plaintiff says, that he ought not, by reason of any thing in the defendant's said plea alleged, to be barred from having and maintaining his said action thereof against him, because he says, that the said close in which, &c. in the said declaration mentioned, at the said time, when, &c. was and is a certain close in the town aforesaid, called the *meadow*, bounded eastwardly on the highway, which said close now is, and at the said time, when, &c. was another and different close from the said close in the defendant's said plea mentioned; wherefore, inasmuch as the defendant has not answered the said trespasses, by him committed, in the said close, in which, &c. above newly assigned, the plaintiff prays judgment, and his damages, on occasion of the committing of the said trespasses above newly assigned, to be adjudged to him, &c.

REJOINDER.

The defendant says, that the plaintiff ought not, by reason of any thing in his said replication alleged, to have or maintain his said action thereof against the defendant, because he says, that he was not guilty of the said several supposed trespasses, in the said replication above newly assigned, or of any or either of them, or of any part thereof, in manner and form as the plaintiff hath above thereof complained against the defendant, at any time within *six years* next before the commencement of this suit, against the defendant in this behalf; wherefore he prays judgment, and that the plaintiff may be barred from having and maintaining his said action thereof against him, the defendant.

SURREJOINDER.

The plaintiff says, that he ought not, by reason of any thing in the defendant's said rejoinder alleged, to be barred from having and maintaining his said action thereof against the defendant, because he says, that

the defendant before, and at the time when the said cause of action in the said replication newly assigned, accrued to the plaintiff, was in parts out of this state, to wit, at *Quebec*, in the province of *Lower Canada*; and that he, the defendant, afterwards, to wit, on the 1st day of August, A. D. 1835, returned from the said parts out of this state, which said return of the defendant was his first return into this state, from the said parts out of this state, after the accruing of the said cause of action, to wit, at the town of *Saratoga Springs* aforesaid. And the said plaintiff further says, that he commenced this suit against the defendant, in this behalf, within *six years* after the defendant's first return into this state after the accruing of the said cause of action, to wit, at the town of *Saratoga Springs*, aforesaid; wherefore he prays judgment, and his damages aforesaid to be adjudged to him, &c.

REBUTTER.

The defendant says, that the plaintiff ought not, by reason of any thing in his said surrejoinder alleged, to have or maintain his said action thereof against the defendant, because, he says, that the plaintiff did not commence this suit against the defendant, in this behalf, within *six years* next after the defendant's first return into this state after the accruing of the said cause of action unto the plaintiff, in the manner and form as the plaintiff hath above in his said surrejoinder, in that behalf alleged.

In a court of record, the defendant would conclude this *rebutter* in these words: "*and of this he puts himself upon the country*," which *country* means the *jury*, who are to try the cause. Upon this, the plaintiff joins issue by a *surrebutter*, in these words: "*and the said plaintiff doth the like*."

In a justice's court, as we shall see by and by, the issue is joined, for all the purposes, both of form and substance, the moment the parties arrive at that point in pleading, where a matter is *alleged* on one side, and *denied* on the other. So far as this court is concerned, the *forms* of joining an issue, at the common law, would be both unnecessary and absurd; for the calling of a jury does not follow an issue *of course*, as at common law, but the issue is referred to a trial by the *justice*, unless a jury is demanded by one of the parties. But of this hereafter.

Our *eighth* division of *regular* pleading was, what is called in the common law courts *pleas puis darrien continuance*.

Now suppose an issue between the parties to be joined in the above, or any other form, and that the cause is continued by adjournment for decision to any other day, and, before the adjourned day arrives, the parties refer the matter in dispute to arbitrators, who make an award, or the

plaintiff gives the defendant a release, or receives something of the defendant in satisfaction of his demand, or indeed, any other matter of defence arises either in bar or abatement, the defendant may then come into court at the adjourned day, and plead such award, release, accord and satisfaction, or other matter in bar, or in abatement. The title of this plea, in a court of record, signifies *a plea since the last continuance*, because the defendant must always allege that the matter of defence arose *since the cause was last continued*, in order to have his plea received; for if it arose prior to the commencement of the suit, or to the issue joined, it should have been pleaded in the first instance, and cannot afterwards be received. Matter of defence, thus arising after a cause has been continued, must always be pleaded, if it be a full and entire defence, and not merely in mitigation of damages, and can never be given in evidence, as it may many times be, if it arise earlier, under the general issue.

This plea, in form, prays judgment, whether the plaintiff ought further to have and maintain his action against the defendant, because, since the last continuance of the cause, by adjournment, to wit, on such a day, at, &c. the matter of defence arose, setting it forth, the same as any other plea in bar or abatement, according to its nature.

2. AN INSTANCE OF THE SECOND KIND OF PLEADING, CALLED IRREGULAR.

In a justice's court, we have said that this is confined to demurrers. *Demurrers to evidence, bills of exceptions, &c.* which, in courts of record, are also classed under this head,^(z) are, as we shall see hereafter, inapplicable to this court. In any stage of the above pleadings, if one party is dissatisfied, either with the substance or form of the pleading, which his antagonist exhibits against him, the way to avail himself of this objection is, by a *demurrer* thereto. Instead of answering the pleading, he *demurs*—that is, he merely states to the justice, in writing or by parol, *that the pleading is not sufficient in law for the plaintiff to have or maintain his action against the defendant*, if it be a declaration, replication, surrejoinder, or other pleading on the part of the plaintiff. On the other hand, if it be a pleading on the part of the defendant, a plea, rejoinder, rebutter, &c. the plaintiff demurs to it, by stating, *that it is not sufficient in law to bar or preclude him from having or maintaining his action against the defendant*. Thus, if the above declaration should omit to mention *the day* of the trespass being committed, the defendant might demur specially, for this defect in form,^(a) pointing it out particularly, which

(z) Vid. 1 Chit. Pl. 219.

437, 438, and n. a. 3 Wen. 75. 12 id.

(a) 14 John. 369. Vid. 2 Cowen, 375.

we shall hereafter see is always necessary in a demurrer for defect of form, though otherwise of substance, as if the plaintiff had merely stated a *trespass*, without showing in what it consisted. Again, should the above plea merely specify the close in which the trespass was committed, and attempt to justify the trespass by denying *that the plaintiff ever forbid the defendant to turn his horses and cattle into it*, or state other matter which would not operate in law to justify the injury, the plaintiff might *demur generally*, that is, say the plea is insufficient, &c. *generally*, without specifying the defect in the demurrer, but content himself with mentioning it on the argument; and so of the subsequent pleadings. When the pleading of a party is demurred to, the manner of joining issue is, for him, if plaintiff, simply to allege *that it is sufficient in law, for him to have and maintain*, &c.; if defendant, *that it is sufficient in law, to bar and preclude the plaintiff from having and maintaining*, &c.; which makes what is called an issue in law, which the justice alone is to decide. But more of this hereafter, in its proper place.

SECTION IX.

OF THE DECLARATION.

FIRST. OF ITS GENERAL REQUISITES.

The declaration is a statement in legal form, of the plaintiff's cause of action; (b) and its most important requisites are, 1. That it correspond with the process; 2. That it contain a statement of all the facts necessary, in point of law, to sustain the plaintiff's action; 3. That these circumstances be set forth with certainty and truth. (c)

I. THE DECLARATION MUST AGREE WITH THE PROCESS: 1st, *In the names of the parties*; 2d, *In the number*; and 3d, *In the character of the parties suing or sued*.

1. If the defendant is sued by a wrong christian or surname, he may plead it in abatement; but if he omit to do this, the plaintiff may pursue him to judgment and execution, by whatever name he is sued, although

(b) Vid. Grah. Prac. 2d ed. 193. 12 Wen. 10.

(c) Vid. 1 Dunl. Prac. 225, 6. Grah. Prac. 2d ed. 193 to 215.

differing entirely from his real one.(d) A misspelling of a name, unless it give a different sound, is not a misnomer;(e) and the omission of the *middle* or *initial letter* thereof, commonly called the *middle letter*, as *John Doe*, where the actual name is *John S. Doe*, for instance, is not a legal misnomer, and the omission is immaterial, for the law knows but one christian name.(f) And where the defendant pleads a misnomer in abatement, the plaintiff may avoid it by stating in his replication, and proving that the defendant is known as well by the name in which he is sued, as the one which he insists upon in his plea.(g) Where the defendant is described in the process thus: *James Jackson*, otherwise called *John Hackley*, called an *alias dictus*, the defendant cannot plead a *misnomer* in abatement for this reason, if the name preceding the *alias dictus* be right. The true name is that which precedes the *alias dictus*.(h) On the defendant's pleading his own misnomer in abatement, he must always give his real name, and the court may then suffer the plaintiff to amend, by inserting in the process the true name so given, instead of the one by which the defendant is sued.(i) It is provided by statute,(j) that when the name of any defendant shall not be known to the plaintiff, he may be described in the *summons* or *warrant* by a fictitious name; and if a plea in abatement be interposed by such defendant, the justice, before whom the suit is pending, shall amend the proceedings according to the truth of the matter; and shall thereafter proceed therein in the like manner, as if the defendant had been sued by his right name. There is a similar provision of the statute applicable only to process from courts of record,(k) under which it would seem, that if the process be returned personally served, and the defendant do not appear, the plaintiff may, from the necessity of the case, declare against the defendant by the name given him in the process.(l) And such is undoubtedly the course to be pursued in a justice's court, in default of the defendant's appearance, or, in case of his appearance, a failure to plead a misnomer. It will be seen, however, that the authority given by the statute to insert a fictitious name, applies only to suits commenced by *summons* or *warrant*. If the suit be by *attachment*, the greatest care should be taken in naming the defendant correctly; that is, either his real name, or some name by which he is known and called; otherwise the officer executing the pro-

(d) 2 Str. 1218. 3 East, 167. 6 T. R. 235, 6, per Ld. Kenyon, Ch. J. 3 Caines, 219. 9 John. 159.

(e) 3 Caines, 219.

(f) 5 John. 84.

(g) 3 Caines, 219. 5 John. 84.

(h) 4 John. 118.

(i) 3 Maule & Selw. 450, and vid. several cases there cited by the counsel. Vid. Sess. Laws of 1830, p. 394, 5, § 37. 2 R. S. 200, § 282.

(j) Id.

(k) 2 R. S. 270, § 4.

(l) Vid. Grah. Prac. 2d ed. 200.

cess will be liable to an action of trespass for taking the defendant's goods;(m) and this, even though the person whose goods are taken, be the person really intended in the proceeding. And if an attachment should be issued against a defendant by a fictitious name, the justice should not, in default of the defendant's appearance, proceed further with the cause. If he should appear and plead to the declaration, or plead the misnomer in abatement, in either of these cases the plaintiff might proceed to judgment against him; for the first would amount to a waiver of the irregularity, and in the latter case, the justice might amend, as above suggested. The amendment of process may be made by erasing and inserting in the body of the process itself,(n) the justice noting the amendment in his docket; or by simply noting the amendment in his docket, without altering the process. The mode of making the amendment is mere matter of form, and it is enough that it appear on the docket what the nature of the amendment was.

The name of the plaintiff must be correctly stated in the process; and if either the christian, or surname, be omitted or mistaken, the defendant may plead the omission or misnomer in abatement.(o) And in declaring, the name of the plaintiff must be as it is in the process; and if it be mistaken there, it cannot be corrected in the declaration;(p) as where the process was at the suit of G. B. W., and the declaration was at the suit of C. W., stating that the defendant was arrested at his suit, by the name of G. B. W., the declaration was held irregular.(q) These remarks apply only to the case where a plaintiff, wrongly named in the process, proceeds to judgment without first moving for and procuring an amendment of the process. This he may do, and thus obviate all objection and error that would otherwise exist against the proceeding and judgment. An amendment in such a case was sanctioned by the supreme court,(r) where a justice, on the return of a summons in favor of several plaintiffs, amended the same, on motion of the plaintiffs' counsel, (which motion was opposed by the counsel for the defendant,) by striking out the word *Joseph* in the name of Joseph S. Keeler, and inserting, in lieu thereof, the word *Jasper*. In delivering the opinion of the court in that case, Ch. J. Savage, after citing several cases in which amendments had been allowed by courts of record, remarks: "The language of the revised statutes is broad: 'The court in which any action shall be pending, shall have power to amend any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on

(m) 6 T. R. 234.

(n) Vid. 10 Wen. 213.

(o) Com. Dig. Abatement, E. 18, 19.

(p) 1 Cowen, 37.

(q) Id.

(r) 10 Wen. 213.

such terms as shall be just, at any time before judgment rendered therein,' 2 R. S. 424, § 1, (p. 313, 2d ed.) The seventh section provides, that *after verdict*, judgment shall not be stayed for a variety of defects in process, pleadings and proceedings; among them is a mistake in the name of any party. It is a general rule, that any matter which is *cured by verdict*, is amendable before verdict. There is no question, therefore, that this matter was amendable; and that a justice's court possesses the same power as to amendments, as courts of record, appears from 2 R. S. 225, § 1, (p. 158, 2d ed.) 'Every justice of the peace elected in any town of this state, or appointed for any city in which special courts are not established by law, is hereby authorized to hold a court for the trial of all actions in the next section enumerated, and to hear, try and determine the same according to law and equity; and for that purpose, where no special provision is otherwise made by law, *such court shall be vested with all the necessary powers which are possessed by courts of record* in this state.'" Vid. also 1 John. Cas. 243. 2 Str. 1218. 3 East, 167. Whether the defendant appear or not, it would be regular to amend the process, by inserting the plaintiff's true name; but if the plaintiff should proceed to judgment under the mistaken or erroneous name, it would be error.

2. The declaration is irregular, if it vary from the process in the number of plaintiffs.(s) And so of the defendants, it would seem, in a warrant or attachment, which are in the nature of *bailable process* in a court of record.(t) But it has been repeatedly decided by the English courts of king's bench and common pleas, that the plaintiff may sue out process *not bailable*, that is, on which no arrest is to be made, against any number of defendants jointly, and yet declare against them severally, such process being intended merely to give the defendants notice of the proceedings, and bring them into court, thus making a single process the foundation of as many suits in favor of the same plaintiff as there may be defendants named in it.(u) The rule would, without doubt, be the same in relation to a summons, and the practice under it would be highly convenient and expeditious. It is not unusual for tradesmen, &c. in extensive business, to commence twenty, thirty, or even a greater number of suits, by summons, before a justice at the same time. All the defendants, under this rule, may be inserted in a single summons, thereby giving it the operation of a separate summons for each. But, as this rule

(s) Vid. 1 Chit. Pl. 226. 1 Bos. & id. 258. 1 Bos. & Pull. 19. id. 49. 4 Pull. 339. East, 589.

(t) 4 T. R. 496. id. 697, n. (b.) 2 (u) Id. ibid. 16 John. 44.

has never been directly applied to a justice's court, let the summons be in the following form, which will remove all doubt :

"THE PEOPLE, &c. *We command you to summon A, B, C, D, E, F, (and so on to any number of defendants,) severally and individually, each for himself, to appear before RANSOM COOK, Esq. one of our justices, &c. on, &c. at, &c. then and there, severally and individually, each for himself as aforesaid, to answer JAMES JACKSON, in a plea, &c. to his damage, &c.*

Even where a warrant is issued against a number of defendants jointly, and only a part are taken, the plaintiff may, if the proceeding be for a wrong upon which the defendants are liable *jointly* and *severally*, declare and proceed to judgment therefor against such as are taken, omitting to notice the others, or stating that those who are taken, committed the wrong with the others named in the process, who are not taken.(v) But should the declaration and judgment, in such case, be against all, we have seen it would be error.(w)

3. How far the declaration must agree with the process, in the *particular character* in which the plaintiff sues or the defendant is sued, we have seen ante, p. 457. Vide also 1 Chitty's Pl. 227. 2 Caines, 134. Tidd's Prac. 403.

We have before noticed that the declaration need not agree with the process, in the *cause of action* therein expressed.(x)

2. THE DECLARATION MUST STATE ALL THE FACTS ESSENTIAL TO THE SUPPORT OF THE ACTION, WITH WHAT DEGREE OF CERTAINTY, IN GENERAL, WE HAVE ALREADY SEEN.

1. It must appear, with certainty, who are the parties, and a declaration by or against A. B. & Co. is not sufficient.(y) And where different persons, *of the same name*, are used in declaring, they should be distinguished by some appropriate allegation, as the said *first* or *second mentioned A*, or *the now defendant*, or *the now plaintiff*, or *A, deceased*.(z) And after naming them once, they may be called *plaintiff* and *defendant* afterwards, throughout the pleadings, without naming them by their christian and surnames ;(a) or without the addition of the character in which

(v) 1 Will. 90, 306. 2 John. 365. 12 id. 434. Ante, 499 500.

(w) Ante, 269, 270.

(x) Ante, 453, 459. Vid. 16 John. 162. 10 id. 240.

(y) 8 T. R. 503. 3 Caines, 170. 1 Penning. R. 75, 137. Ante, 457.

(z) 1 Chit. Pl. 230.

(a) 6 Taunt. 121. Archb. Pl. 90.

they sue or defend.(b) And if a plaintiff have the same christian name as a defendant, and the declaration, after stating the names of each party correctly, and at full length, use the christian name only, as, "the said James," &c., it is certain to a common intent, and good on special demurrer.(c)

2. The declaration must state a *time* and *place*, though these, in general, are immaterial in proof, and the plaintiff may sustain his suit by proving that the cause of action arose on any other day, or at any place different from the one laid in the declaration. In the few cases of local actions, however, noticed ante, pp. 27, 28, and in this instance alone, it is necessary that the proof agree with the declaration as to place, unless, indeed, the place be made matter of substance, as where the contract declared upon, relate to some particular place, or some particular place is in issue, as in trespass on lands, where the plaintiff has described the premises particularly. And so wholly immaterial is the time mentioned in the declaration, that if the plaintiff state a contract to have been made on a day which would render it unlawful, the defendant cannot, for that reason, demur, but must take issue, thereby giving the plaintiff an opportunity to prove on the trial some other day.(d) Yet, where the day is a material part of the contract or other matter declared upon, it must be proved; as if the plaintiff complain that the defendant violated a contract to work from such a day to such a day, he must prove it, and so of any other special contract; and if he set forth the date, or other time mentioned in a written instrument, the proof must tally precisely in this particular with the declaration, though otherwise if not set forth *as a date*, as we shall see more at large hereafter. In actions on bills of exchange, promissory notes, or other written instruments, not under seal, the date being a material part of the instrument, must be stated in the declaration as it appears upon the face of the instrument, and the slightest variance will be fatal. So of deeds and records. And where the precise date of any fact is necessary to ascertain and determine, with precision, the cause of action, any, the slightest variance between the declaration and evidence, in that respect, will be fatal.(e) An instrument having no date, or where the date is in blank, may be set forth as executed on a certain day, without stating expressly, that it was without date.(f) Where an impossible date is alleged, it may be rejected, provided time be immaterial, if enough be left to give certainty to the pleading; as

(b) 8 Cowen, 235.

(c) *Hildreth v. Hawes*, July, 1801, MS., Kent, Ch. J., cited 3 Caines, 170, note, 2d ed.

(d) 12 John. 287.

(e) *Vid. Grah. Prac.* 2d ed. 209.

(f) 8 Cowen, 26.

where a declaration, in an action for malicious prosecution, alleged that the summons was issued on the *thirtieth* and served on the *fifteenth* of March, 1826. (g) Again, in respect of place ; it should always appear in the declaration that the cause of action arose within the jurisdiction of the justice, that is, within the county for which he is a magistrate. (h) For this purpose, the law, where the cause of action is not strictly local, allows of a fiction, and you may state the cause of action as arising in the place out of the county, where it really did arise, adding what is termed a *videlicet*, "to wit, in the county of Saratoga," or other county, where the cause is tried. This can seldom be necessary, however, except in describing some instrument in writing. Suppose, for instance, a note made and dated at *Boston*, sued in the county of *Saratoga*. You are to declare that the defendant made his promissory note at *Boston*, to wit, "at the town of *Saratoga Springs*, in the county of *Saratoga*," and so of other transitory matters, or causes of action. But, in general, you may state all foreign acts as happening within the county where you sue, except when you are setting forth an instrument in writing dated abroad. (i) If the declaration commence with stating the county where the cause is tried, thus, *SARATOGA COUNTY, ss.*, though no place be stated in the body of the declaration, or even a foreign town and county be stated, yet the declaration will be good, as the act stated *without place*, or with the *wrong place*, will be referred to, and considered in law as arising within *the county* in the margin. And so if the county in the margin be *wrong*, but the county in the body of the declaration be *right*, the latter shall prevail over the place in the margin ; and, in this sense, it is said, that the place in the margin will aid, but not *prejudice* a declaration. (j)

3. It is still more necessary that *certainty* and *accuracy* be observed in stating the *material facts* constituting the *cause of action* itself, for this is matter of substance. But for this, more at large, we refer to the next head of,

3. THE PARTICULAR REQUISITES OF THE DECLARATION.

These are, 1. *Its commencement*. 2. *The statement of the cause of the action*. 3. *Several counts*. 4. *The conclusion*.

The *commencement* of a declaration in a justice's court may, in general, be as follows : Vide 6 Taunt. 121, 406.

(g) 1 Wen 345.

(h) Vid. Grah. Prac. 2d ed. 210. 1 Chit. Pl. 269.

(i) 1 Chit Pl. 250. id. 231, 232.

(j) 1 Chit. Pl. 248, 249. 9 John. 81. 13 id. 449, 450. Ante, 455, 456, n. 2.

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The plaintiff complains of the defendant for this, to wit: (*here state the circumstances which constitute the cause of action.*)

If the plaintiff sue, or the defendant be sued, in a particular character, entitle the cause accordingly, and then commence as above. Thus, if you sue as executor, entitle your cause *James Jackson, executor of the last will and testament of A., deceased, v. Richard Roe*. Enough as to the different manner of entitling causes may be gathered, ante, 456, 457.

Where there are more than one party plaintiff or defendant, the plural, *plaintiffs*, or *defendants*, instead of the singular, *plaintiff*, or *defendant*, is of course to be used, in the commencement, and other parts of the declaration.

The declaration, after commencing, proceeds to state the *cause of action*. This receives its name and character from the facts which are stated as the foundation of the claim, whatever it may be called by the plaintiff, either in his process or declaration. Thus, should the plaintiff in the beginning of his declaration state, *that he complains of the defendant of a plea of trespass, for this, to wit*, and then go on to state the circumstances of the wrong which make it out to be *trespass on the case*, instead of *trespass*, and the defendant takes issue, and goes on to trial, and the proof makes out a claim for a *trespass on the case*, the defendant cannot object that this is a variance between the proof and the declaration, for the cause of action stated at length, shall be deemed the true one.

These remarks would bring me to the forms of declaration, from which, in general, enough may be derived, to enable a plaintiff to state his cause of action with sufficient accuracy. But there is one description of contract, with regard to which so much nicety is required in pleading, that a more particular consideration of the mode, in which it is to be declared on, becomes necessary. I allude to *special contracts not under seal, to do or not to do certain things, &c.* We have already bestowed some attention upon this topic, ante, 96, 97, 98, where the great caution to be exercised, in aiming at a correspondence between the *declaration* and *evidence*, was partially considered and illustrated. The contracts requiring the *special count or declaration*, of which we have spoken, in order to set them forth, may be varied to an infinite extent, and are, therefore, incapable of classification in their *purpose or object*. The following examples will show our meaning. These special counts are required on *awards*; on *contracts to pay money in consideration of forbearance*; on

contracts to pay money on exchange of horses ; on contracts to deliver a bill of exchange or promissory note for goods sold ; or to pay for goods sold to a third person ; or to indemnify ; for not fulfilling a contract to marry ; or a contract to employ a servant ; or a contract to perform works, &c. ; for not performing a contract to accept corn, &c. bought ; for not performing a contract to deliver goods ; for a breach of warranty ; against bailees, for not fulfilling their contracts of bailment ; by a landlord against his tenant, for not repairing, &c. &c.

In setting forth these, and the like special agreements, it is necessary that the plaintiff set forth, 1. *The consideration or motive*, upon which the agreement is founded. The nature of these considerations, in general, were considered, ante, 46 to 49. And we had occasion to consider them with sufficient particularity, ante, 66 to 70, as to what consideration will sustain an assumpsit, without noticing them again here. Illegal considerations are also considered, ante, 240 to 264. In setting forth this consideration, it must appear to be legal and sufficient on the face of the declaration, or the defendant may demur ; it must be set forth truly, as it will appear in proof, or the plaintiff must be nonsuited, provided the objection be taken.(k) The whole of the consideration of the defendant's contract must also, in general, be stated, and if any part of an entire consideration, or of a consideration consisting of several things, be omitted, the plaintiff will fail upon the trial, on the ground of *variance*.(l) It is, however, sufficient, in general, to state so much of any contract, consisting of several distinct parts and collateral provisions, as contains the entire consideration for the act, and the entire act, which is to be done in virtue of such consideration ; and the rest of the contract, which only respects the liquidation of damages, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the justice or jury in reduction of damages, but not necessary to be shown to the court, in the first instance, on the face of the record. In an action founded on fraud, it is unnecessary that the consideration should be set forth particularly. It is enough to say a valuable consideration was paid, and that the plaintiff satisfied the defendant, without any thing more.(m) Where a *part* of a consideration, or *one* of several considerations, is *frivolous* and *void*, it is sufficient to notice only the valid consideration, though if stated it will not vitiate the declaration ; but no mode of pleading can enable a plaintiff to recover, where a part of an *executory*

(k) Vid. 1 Hall's Super. Ct. R. 201.

1 Am. Com. Law, 556, in text and notes.

(l) 6 Conn. R. 176. 4 id. 196 id. 259.

(m) 9 Cowen, 22.

1 Day's R. 10. Vid. also cases cited

consideration is illegal.(n) And if, in addition to the true consideration of a promise, another is alleged, not supported by the proof, it is a fatal variance, and the plaintiff should be nonsuited.(o)

After stating the consideration, the contract itself must be set forth, in all its material parts, either in the *very words* in which it was made, or according to its *legal effect*; and, if there be a *variance* here, between the *declaration* and *proof*, it will be *fatal*.(p) Within this rule it is enough to declare on a deed or other instrument executed by an attorney as the act of the principal, for such is its legal effect.(q). In stating the consideration, we have seen that it is necessary to set forth the whole; but in stating the *contract itself*, it is sufficient merely to state the parts of the promise, the breach of which is complained of, and which go to establish a cause of action;(r) and it is not necessary to state in the declaration other parts, not qualifying or varying in any respect those, the breach of which is complained of: as where the plaintiff declared, that in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him *another horse*, which would be worth £80, and be a *young horse*, and then alleged a breach in *both these respects*, the declaration was held sufficient, though the *proof* was, not only of a promise that the second horse should be worth £80, and be a *young horse*, but also of a *warranty that it was sound*, and *had never been in harness*.(s)

It is always sufficient to state so much as constitutes that *provision* in the contract, the *breach* of which is complained of, and which *prescribes* the duty to be *performed*, and the *time, manner* and *other circumstances* of its *performance*. There are a great variety of agreements not under seal, containing *detailed provisions*, regulating *prices of labor, rates of hire, time and manner of performance, adjustment of differences, &c.* which it may not be necessary to set forth;(t) for perhaps the plaintiff does not claim for a breach of any of these, but merely for the non-fulfilment of some other stipulation in the contract.

So any proviso or condition in the contract, which goes merely in discharge of it, need not be stated; for this ought to come from the other side; but if such proviso or condition constitute a condition precedent, or if there be any other matter which qualifies the contract, or goes in discharge of the liability of the defendant, it ought to be stated.(u)

(n) Vid. 1 Chit. Pl. 262, 263. 10 Wen. 314.

(o) Vid. 3 Wen. 374.

(p) Vid. 1 Dunl. Prac. 251, and cases there cited in notes. Vid. also 8 Cowen, 36.

(q) 1 Hall's Super. Ct. R. 298.

(r) Vid. 8 Cowen, 36.

(s) Vid. 1 Chit. Pl. 267. Vid. also 2 Wen. 479.

(t) 6 East, 567, per Lord Ellenborough, Ch. J.

(u) Vid. 1 Chit. Pl. 268. Gould's Pl. ch. 4, § 13.

A contract in the alternative must not be stated as an absolute contract, though the option be in the party pleading.(v) Thus, it has been held, that a contract, in the alternative, to transport *fifteen* or *twenty* tons of marble from one place to another, must be stated in the declaration according to the terms of it. If stated as an absolute contract for the transportation of *twenty* tons, the variance will be fatal.(w) These objections of variance must, however, all be made at the trial, or they are waived.(x)

Where this contract is in writing, it is usual to follow the words of the contract, where they are concise and intelligible; and if the legal effect be doubtful, this is the safer course. The plaintiff, however, is not bound to set forth even the *material parts* in *letters* and *words*. It will be sufficient to state the *substance* and *legal effect*, which is shorter, and not liable to misrecitals and literal mistakes.(y) And where a contract, in its *terms*, is defective, it should be declared on according to its legal effect; as where a party entered into an agreement to give a contract for a certain lot of land at four dollars per acre, and no time was specified when the contract was to be delivered, nor when or in what manner the consideration was to be paid or secured, nor what number of acres was contained in the lot; it was held, that in an action for the non-delivery of the contract, the plaintiff must supply the deficiencies in the agreement, by proper averments in his declaration.(z)

Certain *averments*, that is, statements of facts, besides the consideration and contract, are sometimes necessary in these declarations upon a special assumption. An *averment* in *pleading* signifies a *statement of facts*, in opposition to *argument* or *inference*.(a) If there be any thing on the part of the plaintiff, which was to have been performed, as a condition, upon which the obligation on the part of the defendant was to attach, it must be averred to have been performed, or offered or tendered to be performed; and the manner of performance, &c. must be shown, in order that it may appear to agree with the terms of the contract or condition.(b)

Sometimes it is necessary to aver the performance, or an offer to perform the consideration. Where the consideration is *executed*, that is to say, where the promise is made in consideration of something already performed, or performed at the same time that the promise is made, it is

(v) Vid. 1 Chit. Pl. 269. 4 Conn. R. 265.

(w) 3 Wen. 374.

(x) 15 John. 210.

(y) Vid. 1 Chit. Pl. 269, 70.

(z) 9 Wen. 135.

(a) Vid. 1 Chit. Pl. 277.

(b) Vid. Gould's Pl. ch. 4, § 13.

enough to state this fact, without any farther averment. But where the consideration of the defendant's promise is *executory*, that is, to be performed by the plaintiff before the defendant is obliged to fulfil his engagement on his part, the plaintiff must aver that he has performed his part of the contract, or show some *excuse* for not having done so. He must show performance, or an offer to perform, in the case of mutual covenants, and other agreements mentioned, ante, 44, 45, 46, either where the performance is to be at the same time on each side, or where the plaintiff's performance is expressly made a condition precedent. So of all agreements, where mutual acts are to be done at the same time.(c)

In averring an excuse of performance by the plaintiff, he must aver his readiness to perform the act, and the particular circumstances which constitute such excuse. And he should, in general, show that the defendant either prevented the performance, or rendered it unnecessary to do the prior act, by his neglect or by his discharging the plaintiff from performance;(d) and where the defendant had agreed to attend at a certain place, to receive from the plaintiff and his wife a conveyance of certain lands, in an action for his non-attendance, it was held sufficient, in a justice's court, in order to entitle the plaintiff to recover, to aver *that the plaintiff and his wife attended at the place appointed, ready and offering to execute a conveyance according to the said agreement; and that the defendant did not attend: and that he has refused to accept the same, and to perform the agreement on his part.*(e)

The omission of these averments would be fatal on demurrer.(f)

Again; notice must sometimes be averred. Where the performance of a condition precedent, or other event, upon which the defendant's liability depends, lies more properly within the knowledge of the plaintiff than of the defendant, then the declaration ought to state express notice to the defendant of the performance of the condition precedent, or the happening of the event; and this must be proved to have been given before suit brought; but this is unnecessary, where the defendant has the same opportunity with the plaintiff to know the fact.(g)

Sometimes, also, a request is necessary to be averred; but for this we refer to the subsequent head of *tender*, where the cases in which this is necessary will be fully considered and referred to.

This doctrine on the subject of a special *assumpsit*, is equally applica-

(c) Vid. 1 Chit. Pl. 278 to 284.

(d) Id. 284, 5.

(e) 1 Caines, 45, 46.

(f) 1 Chit. Pl. 285.

(g) Vid. 1 Chit. Pl. 285, 6, 7. Gould's Pl. ch. 4, § 15.

ble to *contracts under seal*, with this difference only, that in setting forth the latter, no consideration need be averred.^(h)

But the mode of pleading cannot be fully illustrated otherwise than by its forms, to which I shall now proceed.

SECTION X.

FORMS OF DECLARATIONS.

I have supposed the declaration, after giving the *names of the parties* in the title to the cause, in all cases to commence as stated ante, 590. I shall, in giving the forms, use the title *plaintiff* and *defendant*, instead of the names of the parties. Where the latter is preferred by the pleader, the change can easily be made; but when their names have once been distinctly set forth in any pleading, it is sufficient afterwards to designate them as the said *plaintiff* or *plaintiffs*, the said *defendant* or *defendants*, without repeating their names.⁽ⁱ⁾ This is sometimes highly useful for the purposes of brevity, where the parties are numerous. At any rate, it will answer me this purpose, in the manner they are to be used, in the forms which I propose giving; for I shall simply adopt in these, the initials P. and D. to represent the parties, *plaintiff* and *defendant*.

The order in which I shall give these forms, will correspond with that in which I treated of the actions to which they relate, in CHAPTER II. Ante, 37 to 450. I shall therefore exhibit forms of declarations: 1. *In debt*; 2. *Covenant*; 3. *Trespass on the case*; and 4. *Trespass*.

I. IN DEBT.

ON A JUDGMENT.

[*Commencement as ante, p. 590.*]

That the said P., by the consideration and judgment of the supreme court of judicature of the state of New-York, (or "*of the court of common pleas of the county of Saratoga*:" or "*of a court held before A., one of the justices of the peace of the county of Saratoga*,") at the capitol, in the

(h) Vid. 1 Chit. Pl. 262.

(i) 4 Bos. & Pull. 289. 6 Taunt. 121, 406. 8 Cowen, 235.

city of Albany, to wit, at the town of Saratoga Springs, in the county of Saratoga, (or, if in the court of common pleas, say, "*at the court house, in the village of Ballston Spa, in the said county of Saratoga :*" or, if in a justice's court, say, "*at the dwelling house of the said A., in the town of Saratoga Springs, in the said county,*") of the term of July, A. D. 1840, (or as the term of the court is, or, if in a justice's court, say, "*on the 20th day of August, A. D. 1840,*") recovered against the said D. \$200 for a debt, and also \$10 for his damages, which he had sustained, as well by occasion of detaining the said debt, as for his costs and charges, by him about his suit, in that behalf expended, (or, if the recovery was in case, say, "*\$200 for his damages, which he had sustained, as well by reason of a certain trespass on the case, as for his costs and charges, &c. :*" or, if in any other form of action, state the fact accordingly ; or, if the action be on a judgment for costs in favor of the defendant, say, "*\$50 for his costs and charges, by him laid out in and about the defence of a certain action of trespass on the case,*" or as the action is, "*then lately prosecuted, against the said P. by the said D.,*") as by the record thereof more fully appears, (*this is to be omitted, if the judgment were before a justice,*) which said judgment still remains in full force and effect, wholly unsatisfied, not paid or reversed, annulled or set aside, and whereof the said P. hath not had execution ; yet the said D., although often requested, hath not paid the said sum of \$50, or any part thereof to the said P., but hath always refused, and still doth refuse so to do.

In this declaration, the nature of the action in the suit in which the judgment was recovered, should be briefly stated according to the fact, as also for what cause the recovery was had ; as whether it was for *debt* and *costs*, as in an action of debt ; or for *damages* and *costs*, as in other actions where judgment is for the plaintiff ; or simply for costs, where judgment is for the defendant, &c. Vid. 12 Wen. 473. 9 Cowen, 26.

ON A PENAL BOND TO PAY MONEY.

That the said D. on the first day of May, A. D. 1840, at the town of Saratoga Springs, in the county of Saratoga, by his certain bond, sealed with his seal, and now shown to the court here, (1) the date whereof is the

(1) "AND NOW SHOWN," &c. This is called a *profert*, and is a necessary form in all cases where a *deed* is pleaded. A *profert* must also be made of *letters testamentary* or of *administration*, where the plaintiff sues in either of those characters. that is to say, the *letters testamentary*, &c. must be produced, in order to show the plaintiff's authority to sue in that particular character. The party against whom a deed or sealed contract is pleaded, is always entitled, on demanding it, to *oyer*, i. e. to have a copy or sight of the deed, &c., before he pleads, with which

same day and year aforesaid, acknowledged himself to be held and firmly bound to the said P. in the sum of fifty dollars, to be paid to the said P. when the said D. should be thereunto afterwards requested. Yet the said D., although often requested, &c., hath not paid the said sum of money, or any part thereof, to the said P.; but has always refused, and still refuses so to do.

If a bond or other deed be pleaded with a profert, and the defendant plead *non est factum*, and the plaintiff cannot produce the bond, &c. at the trial, he will be nonsuited. 4 East, 585. It is therefore frequently necessary, or advisable, instead of the profert in the above form, to insert in the declaration one of the following excuses, which are to be framed according to the fact; or at least to add a second count, containing such excuse. These excuses of the profert are as follows: "and which said bond having been *lost*, (or, "and which said bond having been *destroyed by accident*," or, "*by fire*," or, "*by said D.*") the said P. cannot produce the same to the court here." Vid. 3 T. R. 151. If the bond be in the possession of the defendant, the excuse of the profert runs thus: "and which said bond being *in the possession of the said D.*, the said P. cannot produce the same to the court here." It seems sufficient if an allegation of this nature be true at the time of declaring; if the deed be afterwards found, it will not vitiate the allegation. 2 Campb. 557, 558. Vid. Yates' Pl. 460.

ON A JAIL BOND ASSIGNED TO THE PLAINTIFF.

That whereas, the said P., on, &c., at a court held before *Ransom Cook*, Esq., then one of the justices of the peace of the said county, by the consideration and judgment of the same court, recovered against *Richard Roe*, twenty-five dollars, for his damages, as well by the occasion of the trover and conversion by the said *Richard* of a certain horse of the said P., as for his costs and charges by him about his suit in that behalf expended; and afterwards, to wit, on, &c., at, &c., at the same court, then and there held before the said *Ransom Cook*, still being such justice as aforesaid, the said P. sued out a certain execution upon the said

How to plead a judgment in trover before a justice.

How to plead an execution issued by a justice.

the party pleading it must furnish him. 12 John. 401. If the party cannot make this profert, &c., he must state the reason in the pleading, as that it is lost by accident, destroyed by, or in the hands of the other party, or some other person, &c. The omission of a profert, when necessary, can only be taken advantage of by special demurrer. Vide 1 Chit. Pl. 313 to 315.

judgment, directed to any constable within the said county, commanding him to levy the said damages of the goods and chattels of the said *Richard Roe*, (such goods and chattels as are by law exempted from execution, excepted,) and to bring the money before the said justice within thirty days thereafter, to render to the said P.; and that if no goods or chattels could be found, or not sufficient to satisfy the said execution, then the said execution did further command the said constable to take the body of the said *Richard Roe*, and convey him to the common jail of the said county, there to remain until the said execution should be satisfied and paid.

The delivery of process to an officer. Which said execution afterwards, on the day and at the place last aforesaid, was delivered to *George C. Loomis*, then being one of the constables of the said county, to be executed in due form of law. And the said *George C. Loomis*, so still being constable as aforesaid, afterwards, on the day, and at the place last aforesaid, in virtue of the aforesaid execution, took and arrested the said *Richard Roe*, by his body, and then and there delivered him to *Samuel Freeman*, Esq., then sheriff, and keeper of the jail in the said county, who then and there received the said *Richard Roe* into his custody, by virtue of the said execution. And the said *Richard Roe*, so being in custody of the said keeper of the said jail as aforesaid, did, afterwards, on the day and at the place aforesaid, together with the above named defendant, *John Stiles*, by a certain bond dated the day and year last aforesaid, (and to the court here now shown,) acknowledge themselves to be held and firmly bound unto the said *Samuel Freeman*, (by the name and description of *Samuel Freeman*, Esq. sheriff of the county of Saratoga,) he, the said *Samuel Freeman*, then being sheriff of the said county as aforesaid, in the penal sum of fifty dollars, to be paid to the said *Samuel Freeman*, sheriff as aforesaid, when they, the said *Richard Roe* and *John Stiles*, defendants in this suit, should be thereunto afterwards requested, subject to a certain condition thereunder written, that if the said *Richard Roe* should remain a true and faithful prisoner, and should not, at any time, or in any manner, escape, or go without the limits and boundaries of the liberties established for the jail of said county, until discharged by due course of law, then the said obligation to be void, or else remain in

The arrest in virtue thereof.

Commitment to the custody of the sheriff.

The execution of the jail bond

And how to set the same forth.

The condition of a bond pleaded.

full force and virtue. And afterwards, on the day and at the place last aforesaid, at the request of the said P., he the said *Samuel Freeman*, still being sheriff as aforesaid, by an endorsement on the said bond, under the hand and seal of the said *Samuel Freeman*, (and now shown to the court here, the date whereof is the same day and year last aforesaid,) did, in the presence of a witness, sell, assign and transfer the aforesaid bond to the said P. And the said *Richard Roe*, afterwards, on the day and at the place last aforesaid, did escape and go at large, out of the limits and boundaries aforesaid, without the consent, and against the will of the said P. ; by reason whereof an action hath accrued to the said P., to demand and have of and from the said defendants in this suit, the aforesaid sum of fifty dollars. Yet the said defendants (although often requested, &c.) have not, nor hath either of them, paid to the said P. the said sum of fifty dollars, or any part thereof ; but they to do this have hitherto wholly refused, and still do refuse so to do.

And the assignment set forth.

An escape pleaded.

In order to avoid the danger of a variance, the party pleading a judgment, record, execution, bond, or other instrument in writing, should not set forth unnecessary particulars. Thus, in stating an execution or other process, a bond or other written instrument, he may say generally, that it issued or was made, &c. on such a day, without stating its date, and if it turn out in proof that it issued, or was made, or even dated on a day differing from the day stated in pleading, it will be no variance ; when, at the same time, if the pleading profess to give the date, a variance in the proof will be fatal. Vide 1 Chitty's Pl. 231. 5 John. 100, 101. And, in pleading an execution, it is safest to state, after setting forth the amount of the judgment, that the officer was commanded thereby to levy the *debt* and *damages*, or the *damages* and *costs* awarded by the judgment, without saying how much the execution was for. Where the execution was thus set forth, it was held, that even a variance between this and the judgment, in the *amount recovered*, could not be made an objection. 5 John. 89. id. 101, 2, per Kent, Ch. J. Vide also Page v. Woods, 9 John. 82.

DECLARATION AGAINST A CONSTABLE FOR NEGLECTING TO RETURN AN EXECUTION WITHIN FIVE DAYS AFTER THE RETURN DAY. Vid. 2 R. S. 182, § 157. 10 Wen. 370.

State the judgment, execution and delivery thereof to the defendant, substantially as in the last precedent, and proceed in this form :

And the said P. avers that the said D. neglected to return the said execution according to the exigency thereof, or, within five days after the return day thereof, but wholly neglected so to do, whereby the said D. became liable to pay to the said P. the amount of the said execution with interest thereon from the time of the rendition of the said judgment as aforesaid. Yet the said D., (although often requested, &c.) hath not paid to the said P. the said sum of twenty-five dollars and interest as aforesaid, or any part thereof ; but he to do this, hath hitherto wholly refused, and still doth refuse so to do.

An action of debt is given by 2 R. S. 356, § 66, against a sheriff, for an escape of a prisoner committed to jail in execution in a civil action. The provision includes escapes from executions issued by justices of the peace. At common law, the only remedy was by an action on the case, where the measure of damages was open to the investigation of the jury. The old statute, 1 Laws of 1813, p. 425, gave the action of debt where the escape was from imprisonment *on an execution issued from a court of record* ; and hence it was held, that under that statute, debt would lie only where the escape was from imprisonment on an execution issued from a court of record. 1 Wen. 115. There are no such restrictive words in the present statute ; the provision is general and comprehensive, including all executions in civil actions from whatever court they may issue. The measure of damages is, the amount of the judgment ; and the action may be brought in a justice's court. 9 John. 369. The form of declaration against a sheriff for an escape from imprisonment, on an execution issued by a justice, may be in nearly the same words of the above precedent for a declaration on a jail bond, omitting the statements in regard to the execution, contents, condition and assignment of the bond. The form may be easily adapted to this case.

Our remarks, ante, 37, 40, are liable to the construction, that in actions given by statute, the declaration should be in *debt*. I take this occasion, therefore, to say that in such cases, either debt or assumpsit will lie, where the suit is prosecuted by the person *injured* or *aggrieved*, and to whom a pecuniary penalty or forfeiture is specially granted by law ; and if the forfeiture be of property, it may be recovered in an action of *trover*, or other ap-

propriate action. 2 R. S. 394, § 1. The statute also provides, that every such action shall be prosecuted and conducted in the same manner as other personal actions in all respects, except as therein otherwise provided; and shall be subject to all the provisions of law concerning amendments of the process, pleadings and records therein, and concerning the abatement of such suits by death or otherwise, and all other provisions concerning personal actions not inconsistent with the sixth title, of chapter eighth, of the third part of the revised statutes. 2 R. S. 394, § 2. The provisions of the section first above cited, confine the election between debt and assumpsit to suits prosecuted by the *aggrieved party*. I can find no statutory provision defining the nature of the action when brought by a *common informer*. In the absence of any such provision, no other form of action than debt is sustainable. Vid. 1 Chit. Pl. 101. It is, however, provided generally, that actions by common informers shall be commenced in the name of the person suing, who may appear by attorney; and that the suit shall be conducted and prosecuted the same as personal actions. That no such suit shall be deemed commenced, until process shall be actually delivered to an officer to be executed, which cannot be re-delivered to the plaintiff, but must be returned to the court from which it issued; and that no such action can be compromised or compounded, without leave of the court. 2 R. S. 394, § 5, 6.

The statute prescribes the forms of pleadings and proceedings in suits for the recovery of penalties and forfeitures; and for money, goods, &c. received contrary to the provisions of any statute. Before giving the form of declaration, it may be well that the various sections of the statute applicable to this kind of actions should be cited at length. We shall thus be saved the necessity of a repetition or a particular reference to their provisions hereafter. It is provided, 2 R. S. 273, § 1, that "In actions of debt brought to recover any money, goods or other thing, received by any person contrary to the provisions of any statute, it shall be sufficient for the plaintiff, without setting forth the special matter, to allege in his declaration that the defendant is, or that his testator or intestate was, indebted to the plaintiff in the sum so received, or in the value of the goods or other thing so received, whereby an action accrued to the plaintiff, according to the provisions of such statute, naming the subject matter thereof, in the following form: 'according to the provisions of the statute regulating the rate of interest on money,' or 'according to the provisions of the statute against betting and gaming,' as the case may require, or in some other *general* terms referring to such statute.' The next section, 2 R. S. 274, § 2, provides that, "If an action of assump-

sit be brought for any money received contrary to the provisions of any statute, it shall be sufficient for the plaintiff, without setting forth the special matter, to allege in his declaration, that the same was received contrary to the provisions of such statute, referring to the same, as prescribed in the last section." And by § 3, "If an action of trover be brought for any goods or other thing received, contrary to the provisions of any statute, the plaintiff shall set forth in his declaration, that such goods or other things were converted by the defendant, contrary to the provisions of such statute, referring to the same as prescribed in the preceding sections." So by 2 R. S. 395, § 10, "In actions of debt brought to recover any penalty or forfeiture given by any statute, it shall be sufficient, without setting forth the special matter, to allege in the declaration, that the defendant is indebted in the amount of such penalty or forfeiture, to the officer, person or body, for whose use the same is given; whereby an action accrued according to the provisions of such statute, naming the subject matter thereof in the following form: 'According to the provisions of the statute concerning sheriffs,' naming the section, title and chapter of such statute, as the case may require, or in some other similar terms referring to such statute. § 11. Whenever an action of assumpsit shall be brought for the recovery of any penalty given by any statute, it shall be sufficient, without setting forth the special matter, to allege in the declaration, that the defendant being indebted in the amount of such penalty, according to the provisions of such statute, referring to the same as prescribed in the last section, undertook and promised to pay the same. § 12. If an action of trover be brought to recover any goods or other thing forfeited by the provisions of any statute, the declaration may allege that such goods or other things were forfeited according to the provisions of such statute, referring to the same as prescribed in the foregoing sections, and that the defendant converted the same to his own use, without setting forth the special matter. § 13. To every declaration for a penalty or forfeiture, the defendant may plead the general issue; that he owes nothing; or that he did not undertake and promise, as alleged in such declaration; or that he is not guilty of the premises charged, as the case may require; and may give in evidence under such plea, any special matter, which, if pleaded, would be a bar to such action, or discharge the defendant therefrom, in the same manner and with the like effect as if the same had been pleaded specially. § 14. In any suit for a penalty or forfeiture, brought by any person other than the party aggrieved, or other than any public officer, if a former recovery, acquittal, or other bar to such action be pleaded, the plaintiff may reply, that such recovery, acquittal or bar, was had by covin and fraud; and if such

replication be confessed or established, the plaintiff shall recover in such action, notwithstanding such plea. § 15. Where any act is prohibited by law, under a penalty not exceeding any given sum specified in such law, an action may be brought for such specified sum ; and the jury, or justice before whom the trial shall be had, shall award such sum so specified, to the plaintiff, or such part thereof as shall be deemed proportioned to the offence."

After having thus given a transcript of the statute in relation to actions for the recovery of penalties, &c. we proceed to the form of the declaration in *debt*, which is, under the foregoing provisions, applicable to any statute by which a penalty is given.

GENERAL FORM OF DECLARATION IN DEBT FOR A PENALTY GIVEN BY
STATUTE.

That the said D. on, &c. at, &c. was indebted to the said P. in the sum of fifty dollars, *for so much money before that time had and received of the said P. by the said D., contrary to the statute, (here state the title, &c. as particularly as may be,)* whereby an action accrued to the said P. to demand and have of and from the said D. the said sum of fifty dollars, according to the provisions of the *said statute*. Yet the said D., (although often requested, &c.) has not yet paid the said sum of money above demanded, or any part thereof, to the said P. ; but to pay the same or any part thereof to the said P., the said D. has hitherto wholly refused, and still does refuse.

If the action is not founded on a statute to recover back money *actually* received by the defendant, then omit the words in italics, in the foregoing form, and insert the *title*, &c. of the statute after the words, "provisions of the."

It should be remarked that, in general, where a remedy is given by statute, the mode of declaring is pointed out, and in such case, it must be strictly pursued. 3 Wen. 404.

In an action for the penalty given by statute for selling strong or spirituous liquors without license, it is not necessary for the prosecutor to prove that the defendant has no license ; it is enough to prove a sale, and then the burthen of proof is thrown upon the defendant, to show that he had a license. 19 Wen. 361.

It is proper to observe, with regard to these actions on penal statutes, generally, that where a certain penalty is given in *money*, as well as where a suit is brought upon a *record* or *specialty*, the plaintiff must state in his declaration, the *precise sum* which he claims, and which the penalty, &c. amounts to, and he must recover the *precise sum* or *nothing*.

1 H. Bl. 249. But where no *precise sum* is mentioned in the act itself, but it is left to the justice or jury to fix the amount, the plaintiff's declaration may claim such sum as is convenient, and he may recover *less* upon the trial, according to the amount which he *proves*, the same as in an action of assumpsit. Cro. Jac. 498. 1 Day's R. 19. But we have seen that where the penalty given is *not exceeding* a certain sum, the plaintiff should claim such specified sum, and his recovery may be for a less amount. Ante, 603.

We suppose, that under the general form of declaration above given, the plaintiff may recover, however special his case may be. Under such a declaration he may give in evidence any facts going to establish a cause of action, and which bring his case within the provisions of the particular statute upon which he prosecutes. Vid. 15 John. 5. Vid. also 13 John. 428, where the court say, that "it is a well settled rule, that in declaring for offences against penal statutes, *where no form is expressly given*, the plaintiff is bound to set forth specially, the facts on which he relies to constitute the offence." Vid. also ante, p. 248.

As to the liability of the husband, for a penalty incurred by the wife, and other matters relative to this action of debt on statute, and debt generally, vid. ante, 36 to 42.

II. DECLARATIONS IN COVENANT.

ON A SEALED NOTE.

That the said D. on, &c. at, &c., by a certain instrument in writing, sealed with the seal of the said D., (and to the court here now shown, the date whereof is the day and year aforesaid,) for value received, promised to pay the said P. fifty dollars, with interest, ten days after the date thereof. Yet the said D. (although often requested) hath not paid the said sum of money, or any part thereof, to the said P.; but the same to pay, hath always refused, and still doth refuse so to do. And so the said P. saith, that the said D. hath not kept his covenant in form aforesaid made.

DECLARATION ON AN INDENTURE OF LEASE FOR RENT.

That heretofore, to wit, on, &c., at, &c., by a certain indenture then and there made, between the said P., of the one part, and the said D., of the other part, (the counterpart of which said indenture, sealed with the seal of the said D., is now here shown to the court, the date whereof is the same day and year aforesaid,) the said P. did demise and to farm let, to the said D., his executors, administrators and assigns, certain tenements, with the appurtenances, particularly mentioned and described in

the said indenture, situate in the said town of *Saratoga Springs*; to have and to hold the same unto the said D., his executors, administrators and assigns, from the first day of May then last past, for, and during, and until the full end and term of two years thence next ensuing, and fully to be complete and ended; yielding and paying therefor, yearly and every year, to the said P., his heirs or assigns, the clear yearly rent of fifty dollars, payable in four equal quarterly payments. And the said D. did thereby, for himself, his executors, administrators and assigns, covenant, promise and agree, to and with the said P., his heirs and assigns, that he, the said D., his executors, administrators or assigns, should and would well and truly pay, or cause to be paid, to the said P., his heirs or assigns, the said yearly rent, or sum of fifty dollars, at the several times aforesaid. Yet the said D., although often requested, &c., has not paid to the said P. the aforesaid rent, or any part thereof, but the same to pay hath always refused, and still doth refuse.

In declaring on a written or sealed contract, though it describe the parties as of such a *place*, and of such a *degree*, or *occupation*, this need not be noticed in the declaration. Vide 2 Chit. Pl. 550, n. (h.) The *date* need not be stated. 4 East, 477. If both parts of the deed be *originals*, i. e. *signed and sealed by all parties*, make the *profert* as of *one part*, &c., instead of the *counterpart*, &c. Vide 2 Chit. Pl. 550, n. (i.) The *demise*, *covenants*, &c., and all the *material* parts of a contract, whether written, parol or sealed, must be set forth, either *verbatim*, or according to their legal effect. Ante, 592. And where the words of a lease provided that the lessee should pay "for all necessary repairs put upon the premises" during the term; and in declaring upon it, the breach assigned was, that the lessee "did not nor would," during the said demise, and whilst she was "possessed of the premises," pay, or cause to be paid, to the plaintiff, the repairs that "were necessary," and were made upon the "premises by the plaintiff," it was held to be well assigned; and a demurrer to the declaration was overruled. 1 Hall's Super. Ct. R. 33. The *premises* need not be described at length, in *debt* or *covenant* on an indenture of lease. 2 Chit. Pl. 550, n. (l.) It is not necessary to allege that the lessee for years *entered*. Id. 551, n. (p.) The *time* when the rent became due must be specified. Id. 552, n. (s.)

DECLARATION IN COVENANT FOR NOT REPAIRING.

Containing an averment of the plaintiff's having performed a condition precedent.

Set forth the execution of the indenture, &c., and make *profert* as in the last, and then proceed as follows :

And the said D. did thereby, for himself, his executors, administrators and assigns, covenant, promise and agree, to and with the said P., his heirs and assigns, (amongst other things,) in manner following, that is to say, that he, the said D. and his assigns, from and after the dwelling house standing on the said premises should have been put in good and tenantable repair, by and at the expense of the said P., his heirs or assigns, should and would, at all times during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain and keep the said dwelling house in good and tenantable repair, order and condition, and so leave the same at the end, or other determination of the said term. And the said P. says, that although the said dwelling house, after the making of the said indenture, to wit, on, &c., at, &c., was put in good and tenantable repair, by and at the expense of the said P., yet the said D. would not, and did not, at all times during the continuance of the said demise, or any part thereof, at his own costs and charges, or otherwise, support, uphold, maintain and keep the said dwelling house in good and tenantable repair, order and condition, or so leave the same at the end of the said term.

Two breaches of the same specific covenant cannot be assigned in the same count. 1 Wen. 207. The assignment of breach is good, if according to the substance, though not according to the letter of the covenant. 2 Wen. 583. Vide 1 Hall's Super. Ct. R. 33. Where, on the dissolution of a firm, one of the partners covenants to pay all the company debts, in an action against him for a breach of that covenant, by his partner, who has been compelled to pay a debt of the firm, it is not necessary to aver notice to the defendant of the debt, nor of the suit, recovery and payment. 5 Wen. 499. A declaration on a contract to perform a certain work, alleging that the plaintiff had performed *as nearly as it was possible*, without adding that what was done *was accepted as a full performance*, would be bad. 8 id. 399.

For this action of covenant generally, vide ante, 42 to 46.

III. DECLARATIONS IN TRESPASS ON THE CASE.

First. In assumpsit

DECLARATION

In assumpsit on a special agreement, to receive the plaintiff into the defendant's service.

That heretofore, to wit, on, &c. at, &c. in consideration that the said P., at the said D.'s request, had then and there agreed with the said D. to enter into his service as a journeyman shoemaker, and would serve him in that capacity at certain wages, after the rate of \$200 a year, to be therefor paid by the said D. to the said P., he the said D. promised the said P. to receive him into the service of the said D. in the capacity aforesaid, and to employ him in such service at the wages aforesaid. And the said P. avers, that he hath always been ready and willing to enter into the service of the said D. in the capacity aforesaid, and did afterwards, to wit, on, &c. at, &c. aforesaid, request the said D. to receive him the said P. into the service of the said D. in the capacity aforesaid. Yet the said D. did not, nor would, at the said time, when he was requested as aforesaid, or at any time afterwards, receive the said P. into the service of the said D., or employ him the said P. in such service, at the wages aforesaid, but wholly neglected and refused so to do; whereby the said P. lost the chance of being employed by divers other persons, and remained and continued wholly unemployed for a long time, to wit, for the space of three months, then next following, and was otherwise greatly injured and damnified, to wit, at, &c.

Where the work has been actually performed, the declaration may be for work and labor *generally*. Fitzg. 302. Vid. Chit. Prec. of Pl. 149, n. (y). But where the defendant has refused to employ the plaintiff, the declaration must be special as above. 2 East, 145. Cowp. 437. 4 Esp. R. 77.

For discharging the plaintiff from the defendant's service before the end of his term.

That heretofore, to wit, on, &c. at, &c. in consideration that the said P., at the said D.'s request, would enter into the said D.'s employ, in the capacity of a bar-keeper, for one year, to wit, from the day and year aforesaid, at certain wages, to wit, at the rate of \$30 per month through-

out the year, the said D. undertook and promised the said P. to retain and employ him the said P. in the capacity aforesaid, at the wages aforesaid, and continue him in such employ for one year, to wit, from the day and year aforesaid; and although the said P., confiding in the said promise of the said D., did afterwards, to wit, on, &c. at, &c. aforesaid, enter into the said D.'s employ in the capacity and on the terms aforesaid, and did continue in such employ of the said D. for a long space of time, to wit, until, &c.; and although the said P. was on the day and year last aforesaid, and hath always been ready and willing, and then offered to remain and continue in the said D.'s employ, in the capacity and on the terms aforesaid, for the remainder of the said year; yet the said D. did not nor would continue the said P. in his employ until the expiration of the said year, to wit, from the day and year first aforesaid, but on the contrary thereof, during the said space of one year, to wit, on, &c. at, &c. aforesaid, refused to suffer the said P. to continue in his the said D.'s employ, and wrongfully discharged the said P. therefrom without reasonable cause, and hath thence hitherto wholly neglected and refused to retain or continue the said P. in his the said D.'s employ for the remainder of the said term; by means whereof the said P. hath lost and been deprived of all the wages, profits and advantages which he otherwise might and would have derived and acquired from being continued in the employ of the said D. as aforesaid, and which the said D. hath from that time wholly refused to pay to the said P.; and the said P. hath been and is by means of the premises wholly unemployed.

The declaration should, in general, be special as above, for dismissing a servant, &c. before the expiration of his term of service. Vid. 2 East, 145. But where the dismissal occurs after the commencement of a quarter, and the wages are payable quarterly, and the plaintiff has served during part of the quarter, it seems such quarter's salary may be recovered on the common count for work and labor, if the action be brought after the expiration of the quarter. 1 Stark. R. 198; 4 Campb. 375, S. C. 2 Moore & Payne, 233; 5 Bingh. 132, S. C.

For a form of declaration for discharging the plaintiff from completing a job of work according to agreement, vid. Chit. Prec. of Pl. 195.

For not putting up a building.

That heretofore, to wit, on, &c. at, &c. by a certain agreement then and there made, by and between the said P. and the said D., it was agreed that the said D. should frame, enclose and lay the floors of a certain barn, with materials to be furnished by the said P., and that the

same work should be commenced on the first day of May, A. D. 1840, and completed by the first day of June in the same year, according to a certain plan thereof, then in the possession of the said D., for the consideration of fifty dollars, to be paid by the said P. to the said D. on the same work being completed by him. And afterwards, to wit, on, &c. at, &c. the said D., in consideration that the said P. had, at the request of the said D., promised him to perform his part of the said agreement, promised the said P. that he the said D. would perform his part of the said agreement. Yet the said P. saith, that although he hath always in every respect been ready and willing to perform his part of the said agreement, and did, on, &c. at, &c. offer the said D. to perform the same; and although the said P. found, provided and furnished the materials for building the barn aforesaid before the said first day of May, to wit, on, &c. at, &c., of all which the said D. then and there had notice, and was moreover requested to perform his part of the said agreement; yet the said D. has hitherto altogether neglected and refused to frame, enclose and lay the floors of the said barn in the manner, within the time and according to the plan aforesaid; whereby the said P. has not only sustained great damage in the exposure of the said materials to the weather, but was obliged to hire, and did hire another barn, in which to secure his clover hay, at a great price, to wit, at the price of ten dollars, to wit, at, &c. on, &c.

With what strictness a special agreement must be performed, *vid. ante*, 108 to 116.

A *breach* of the contract set forth should always be stated in the declaration, with a *request* to perform, or it will be bad on demurrer. Where a request is matter of substance, which we shall see when we come to speak of tender, it should be set forth with the circumstance of time and place, the same as any other essential fact. The contract must be stated to have been broken in its true *sense* and *substance*, and the breach should be neither *larger* nor *smaller* than the engagement stated. If this be in the disjunctive, to do one of two things, the breach should deny the performance of either. It should be *certain* and *express*, and not *general*, as *that the defendant has not performed his agreement*. But these omissions must all be taken advantage of by demurrer. *Vid. 1 Chit. Pl. 287 to 296, and the cases there cited.*

The terms of the contract are to be stated as in the agreement, and when in writing, it is usual to state that it was so. It must be shown in the declaration that the defendant was to have a reward for the work,

&c. or that he performed it unskilfully. 5 T. R. 143. 2 John. Cas. 92. 4 John. 84. Ante, 57.

Such damages as do not necessarily result from the breach of contract, must be stated specially and circumstantially. Thus, *the want of employment*, in the shoemaker's and bar-keeper's case above stated, and the *ten dollars for hiring the barn*, in the last declaration, not being a *necessary consequence of the breach* in either case, should be stated. Vid. 1 Chit. Pl. 296, 7. In one case, however, which was an action on the warranty of certain goods, under the general clause in the declaration, *that they became of no use or value to the plaintiff*, Lord Ellenborough suffered the plaintiff to prove that he intended them for the *Chinese market*, that they were worth *less* there than *elsewhere*, and he recovered damages accordingly, which was approved on a motion for a new trial. 1 Stark. R. 504. And vid. 2 John. 149, where Spencer, J. remarks, in delivering the opinion of the court in an action of covenant upon a special agreement, that "the damages sustained are matter of evidence, and need not be alleged, nor are they scarcely ever stated, but in a general manner."

A declaration is demurrable for claiming damages which appear on its face to have arisen *after* the commencement of the suit; though it would, without doubt, in a justice's court, be good after verdict or judgment. Vid. 1 Chit. Pl. 297.

Against an attorney for not appearing in a cause, whereby a default was obtained.

That heretofore, to wit, on, &c. at, &c. in consideration that the said P., at the request of the said D., then and there retained him, as an attorney of the court of common pleas of the county of Saratoga, to defend a certain action of trover in the same court, by and at the suit of one *James Jackson*, against the said plaintiff in this suit, for certain reasonable fees and reward, to be therefor paid, by the said plaintiff in this suit to the said D., he the said D. promised the said plaintiff in this suit, to conduct the said defence in a diligent manner; but afterwards, to wit, on, &c. at, &c. he, the said D., conducted the said suit in a negligent manner, in not appearing in the said suit, for and in behalf of the plaintiff in this suit, and in not giving, in due season, any notice of appearance or retainer, in the said suit; whereby the said *James Jackson*, plaintiff in the said suit, in the said court of common pleas, afterwards, to wit, on, &c. at, &c. obtained a judgment by default, against the plaintiff in this suit, whereby he was put to great expense and trouble, in obtaining a rule to set the aforesaid judgment aside, in order to get let in to defend the aforesaid action, and hath been forced to pay, and hath paid to the said *James Jackson* a large sum of money, for his costs of the aforesaid judgment,

as a condition of having the same set aside by the said court of common pleas, to wit, at, &c. on, &c.

The above declaration need not be thus particular, and, indeed, it is the safer as well as the more brief and convenient manner of declaring, merely to state, generally, that the defendant promised as above, upon the above consideration, to conduct the suit or defence diligently, but conducted the same in a negligent manner, without showing how, particularly; in which case he will be left at large to prove the specific neglect according to the fact. The same form may be adopted against any agent or mandatary. Rep. Temp. Hardw. 309. It is best to declare both ways in two counts. As to an attorney's liability, vid. 4 Burr. 2061; 2 Wils. 325; 1 Saund. 312, n. 2. And of others, and the distinction where there is no reward, vid. 5 T. R. 143; 7 id. 171; 1 H. Bl. 158; 2 John. Cas. 92; 4 John. 84; id. 185; Ante, 57.

General form of declaration against an attorney, for negligence in conducting an action at the plaintiff's suit against a third person.

State retainer as on preceding page: to prosecute and conduct a certain action in the same court by and at the suit of the said P. against one *John Doe*, for the recovery of a certain large sum of money, which the said P. claimed to be due him from the said *John Doe*, for certain reasonable fees and reward to be therefor paid by the said P. to the said D., he the said D. promised the said P. to use due and proper care, skill and diligence in and about the bringing, prosecuting and conducting the said action; yet the said D. did not regard his said promise in this, that he did not use due or proper care, skill, or diligence in and about the prosecuting or conducting of the said action; and on the contrary, he, the said D., as such attorney, prosecuted and conducted the said action in so careless, irregular, unskilful, and improper a manner, that by reason thereof the proceedings of the said D., in the said action, as such attorney as aforesaid, afterwards, to wit, on, &c., became and were futile and unavailing, and the said P. did not succeed and was defeated therein, and was forced to suffer himself to be and was nonsuited therein, (*according to the fact*.) and he, the said P., thereby wholly lost the means of recovering the money by him claimed and sought to be recovered as aforesaid, and is not likely ever to obtain the same; and thereby, also, the said P. became liable for and was subjected to the costs and expenses of the said *John Doe*, by him incurred in defending the said action, to wit, thirty dollars, and was then obliged to pay the same to him; and thereby, also, the said P. incurred and was subjected to other expenses, to wit, twenty dollars, in prosecuting the said action, and was and is otherwise injured.

In cases where there is no difficulty in proving a *particular neglect*, &c. it would be more correct to state it in a more specific shape ; thus, the allegation may be that "the said defendant did not use due care, &c. in and about the prosecuting, &c. *in this, to wit, that afterwards, on, &c. at, &c. he proceeded to trial in the said action without taking due care to provide and adduce proper evidence on the said plaintiff's behalf in support thereof,*" according to the fact.

Either *assumpsit* or *case* may be brought against an attorney for carelessness or unskillfulness to his client's prejudice, and in violation of the implied promise or duty created by the retainer of the attorney in his professional capacity. When *case* is adopted, the above forms may be readily applied by alleging that, "*whereas, before the committing of the grievances hereinafter mentioned, to wit, on, &c. at, &c. the said plaintiff had, (instead of "in consideration that he had,") retained and employed the said defendant as an attorney, &c. to, &c. for, &c.*" and by omitting, the *promise* and alleging instead, "*and thereupon it became and was the defendant's duty as such attorney, to use due and proper care, &c. (assigning the duty in the terms of the promise in the above forms,) yet, &c. not regarding his duty, &c.*" (laying the injury as in *assumpsit*.)

As to the liability of attorneys and the forms of the pleadings in suits by and against them, *vid. further*, Chit. Prec. of Pl. 62 to 68 ; *id.* 500 ; 2 Chit. Pl. 372 to 383, and notes.

Against vendee, for not accepting wheat.

That heretofore, to wit, on, &c. at, &c., the said D. bargained and bought of the said P., and the said P. at his request, then and there sold to him, twenty bushels of wheat, at the price of two dollars per bushel, to be delivered by the said P. to the said D., in a week, then next following, at the said D.'s dwelling house, in the said town, to be paid for on the delivery thereof, as aforesaid ; and, in consideration, that the said P. had, at the said D.'s request, then and there promised him to deliver the said wheat as aforesaid, he, the said D., then and there promised to pay him, the said P., therefor, as aforesaid ; and although the said P. afterwards, and within a week next after the making the said promise of the said D., to wit, at, &c., did then and there tender and offer, and was then and there ready to deliver the said wheat to the said D., and requested him to accept the same, and pay therefor, as aforesaid ; yet the said D. then and there refused to accept the said wheat, and ever since has refused, and still does refuse so to do, and has always refused, and still refuses to pay for the same, as aforesaid, and every part thereof ; and the said P. has thereby been put to great expense in re-housing the same wheat, to wit, of ten dollars, besides his other damages, to wit, at, &c. on, &c.

As a common count, for *goods bargained and sold*, will, in general, answer every necessary purpose of the plaintiff, the above form need not be resorted to, except where you wish to recover special damage for rehousing, or other special cause. 4 Esp. R. 251. 1 East, 194. 1 Ves. jun. 530. 7 T. R. 67. Ante, 98, 9. A count for *goods bargained and sold*, should, for greater caution, be added to the above, in the same declaration.

If, by the terms of the contract, it were not incumbent on the vendor to deliver at any particular place, but on the vendee to fetch the goods away from the defendant's premises, as is generally intended, when it is not otherwise agreed, 5 T. R. 409, the contract should be stated accordingly, and the defendant's agreement to fetch away, within a specified time, or a reasonable time, should be stated; and, in such case, it will be sufficient to state the plaintiff's readiness to deliver. As to what constitutes a readiness to deliver, see ante, 288.

At the close of the special count, if the goods have been re-sold at a sacrifice, as they may be, by reason of the defendant's default, 1 Salk. 113, 1 Moore and Payne, 761, 4 Bingh. 722, S. C., Peake's R. 58, 3d ed., but vid. 3 Campb. 426, ante, 100, state this fact accordingly in the following form:

And afterwards, to wit, on, &c., at, &c., the said P. was forced to re-sell, and did re-sell the said wheat at and for a much less price than the price so to have been paid by the said D. for the same, to wit, at a loss and deficiency of five dollars, besides the costs and charges of such re-sale, amounting to a large sum, to wit, five dollars: and the said P. was and is by means of the premises, otherwise, damnified.

Declaration against a vendor, for not delivering wheat at a specified time and place.

That heretofore, to wit, on, &c., at, &c., the said P. at the said D.'s request, bargained with him, to buy of him twenty bushels of wheat, and the said D. then and there sold the same to the said P. at the price of two dollars per bushel, to be delivered by the said D. to the said P. within one week then next following, at E.'s grist mill, at, &c., to be paid for on the delivery thereof; and in consideration that the said P. had then and there promised, at the request of the said D., to accept the same wheat of him, and to pay him for the same the price aforesaid, he the said D. promised to deliver the same to the said P. as aforesaid. And although the time for the aforesaid delivery hath long since elapsed, and the said P. was always, within and at the expiration of the said week,

ready to receive and pay for the same, and offered the said D. to pay for the same as aforesaid, to wit, at, &c., yet the said D. neglected to deliver the said wheat as aforesaid, whereby the said P. hath lost and been deprived of divers great gains and profits which might, and otherwise would have arisen and accrued to him from the delivery of the said wheat to the said P. as aforesaid.

The last two precedents, varied according to the facts, will furnish a form in all cases of non-acceptance of, or non-payment for goods, by the *vendee*, or the non-delivery of them, by the *vendor*.

In these cases, if either party would sue upon his agreement, the vendor for not paying, or the vendee for not delivering, the vendor must aver and prove a delivery or tender, and the other a payment or tender; for delivering in the first bargain, was a condition precedent; and though there be mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to be averred, unless a certain day be appointed for the performance. 1 Saunders, 319. If I sell you my horse for ten pounds, if you will have the horse, I must have the money, or if I will have the money, you must have the horse, &c. 1 Salk. 112, per Holt, Ch. J. Ante, 44, 5. The same strictness as to tender is not necessary, where earnest has been paid. 5 T. R. 409.

Declaration in assumpsit against a vendor on a warranty of soundness in a horse.

That the said P. on, &c. bargained with the said D. to purchase of him a horse for the sum of one hundred dollars, and in consideration that the said P. would, at the request of the said D., buy of him the said horse as aforesaid, the said D. then promised the said P. that the same horse was then sound; and the said P. avers that he, confiding in the said warranty of soundness, did then buy the said horse of the said D., and paid him therefor the said sum of one hundred dollars. Yet the said horse, at the time of the promise aforesaid of the said D., was not sound, but on the contrary thereof was then unsound, and for that reason became, and was of no use or value to the said P., and the said P. hath been put to great charges, in and about feeding, keeping and taking care of the said horse, amounting to twenty-five dollars.

I have stated no place in the body of this declaration; and no place need be stated, as we have seen before, ante, 588, 9, where the county is stated in the margin thus, *Saratoga county, ss.* as ante; in which manner I suppose all the *above* and the *following* declarations to commence. If not stated in the margin, it is then necessary to mention a place in the

body of the declaration. 9 John. 81. I shall, accordingly, in the declarations which follow, generally *omit* the statement of any place.

The above declaration in assumpsit on warranty, is a very usual mode of declaring in courts of record. 2 East, 451, 2. If it be doubtful whether the defendant have a partner, declare in *case*. Vid. ante, 565, 6. When this count may be joined with one for a fraud, vid. ante, 562.

The particular description of unsoundness need not be stated, it being a rule in pleading that the breach may, in general, be assigned in the negative words of the contract. 2 Saund. 181, b. 3 T. R. 307. This is much the most prudent; for if you state particulars, you are bound down to them in your proof. 3 T. R. 307.

If the declaration describe the animal as a horse, and it turns out from the evidence to be a mare, this is no variance. 2 Carr. & Payne, 351. And under the general allegation, that the goods *became and were of no use or value to the plaintiff*, he may show on the trial that he wanted the article for a particular purpose, (though this was unknown to the vendor,) and recover special damages for its failing to answer such intended purpose; for instance, where the plaintiff buys horses or oxen to do his spring's work. 1 Stark. R. 504.

The substance and meaning, or exact terms of the warranty, must be stated in the declaration. If it were a warranty, with an exception as to a particular defect, &c. the exception should be stated. Vid. 6 Dowl. & Ryl. 533; 4 Barn. & Cress. 445, S. C. And if there were an exception, there should be an averment that the horse was unsound in other respects than in reference to the excepted defect. Vid. Chit. Prec. of Pl. 187, n. (p). Payment should not be averred unless the fact is so, for payment is not essential to support the action. id.

On the subject of warranties and frauds, *in general*, upon the sale of chattels, vid. ante, 310 to 332.

The forms which I here give, in cases of warranty, may be readily applied to any other description, as that the horse is free from vice, &c.

Where the plaintiff is not sure of proving the exact price as stated, the following brief form will serve in case of warranties, viz.:

Another form for breach of warranty on sale. Vid. 2 Chit. Pl. 281.

That the said D. on, &c. in consideration that the said P. had, at the request of the said D., bought of him a certain horse, at a price then agreed upon between the said parties, the said D. promised the said P. that the said horse was, at the time of his said promise, sound. Yet, in fact, he was not then sound, and thereby was of no use or value to the said P.

It would be no variance, under a declaration in this form, although part of the price were paid by giving goods of a specified value. 9 East, 349.

Declaration in assumpsit, upon a warranty of soundness, on exchange.

That on, &c. in consideration that the said P., at the said D.'s request, would deliver to him a horse of the said P., and would pay him ten dollars in exchange for a mare of the said D., he the said D. promised the said P. that the same mare was sound, and the said P. avers, that confiding in such promise, he did afterwards, to wit, on, &c. deliver to the said D. the said horse of the said P., and pay him the said ten dollars, in exchange for the said mare. Yet the said mare, at the time of making the aforesaid promise, was unsound, and became in consequence thereof of no value to the said P. (*Here state special damage, feeding, keeping, doctoring, taking care of, &c. &c. if any.*)

Another and shorter form. Warranty on exchange.

That on, &c. in consideration that the said P., at the said D.'s request, had delivered to him a horse of the said P., and paid him ten dollars in exchange for the said D.'s mare, the said D. then promised the said P. that the said mare of the said D. was then sound. Yet the said mare, at the time of such exchange, was unsound; and thereby became, &c. (*as in the last.*)

If your proof be not certain, as to *difference money*, &c. state, that in consideration that the said P., at the said D.'s request, had delivered to him a horse of the said P., and paid him a certain sum, then and there agreed upon between the said parties, in exchange for the said D.'s mare, &c.

Where a negotiable note is given as a *price* or *difference* on a *sale* or *exchange*, it may be so stated, with the amount thereof, or perhaps it may be stated as a payment in cash to its nominal amount. Vid. 8 John. 202. And where your witness does not recollect its contents, it is the practice, I find, to state it *generally* as a *note* or *piece of paper*. 7 Mass. R. 65. How far this is warranted? *Quere.* id.

Declaration in assumpsit upon an implied warranty of goods sold. Vid. ante, 316. Chit. Prec. of Pl. 190.

That the said D. on, &c. had in his possession certain goods, to wit, two buffalo robes, and was apparently the owner thereof, and thereupon, &c. in consideration that the said P., at the request of the said D., would buy

of him the said goods for a certain sum of money, to wit, \$20, the said D. promised the said P. that he the said D. had lawful right and title to sell the said goods; and the said P. avers that he did then buy of the said D. the said goods for the said sum of money, and did then pay him the said sum for the same; but the said D. disregarded his said undertaking and promise in this, to wit, that he the said D., at the time of the said promise and sale, had not lawful right or title to sell the said goods; whereby, and by reason of the premises, one A. B. having the lawful right and title to the said goods, afterwards, to wit, on, &c. demanded possession of the same from the said P., and the said P. was accordingly forced and obliged to deliver, and did then give up the same to the said A. B., and the said goods then became, and were, and are wholly lost to the said P., and he hath been deprived of the benefits and profits he would otherwise have derived and acquired from the same.

AGAINST BAILLEES.

For the general doctrine of bailment, vid. ante, 54 to 60, 65.

DEPOSIT. *Declaration against depositary for not taking care of, and safely returning goods entrusted to his care.*

That on, &c. in consideration that the said P., at the said D.'s request, had delivered to him a silver watch of the said P., of the value of \$25, to be taken care of and safely kept by the said D. for the said P., he the said D. promised the said P. to take due and proper care thereof, and to safely keep and redeliver the same to the said P., on being there-to afterwards requested. Yet although the said D. was afterwards, on, &c. requested by the said P. to redeliver to him the same watch, the said D. did not take due and proper care of and safely keep the said watch for the said P., and did not, when so requested, redeliver the same to him, but in fact, the said D. so negligently and carelessly conducted himself with respect to the said watch, and took so little care thereof, that by and through mere negligence, the said watch became and was lost to the said P., to wit, on, &c.

Add a count on the single implied contract to redeliver, omitting the allegation of carelessness:

MANDATE. *Against a mandatary for negligently losing goods received to carry.*

That on, &c. at the village of *Saratoga Springs*, in consideration that the said P., at the said D.'s request, delivered to him the said D. a cer-

tain silver watch of the said P., of the value of \$25, to be carried by the said D. from thence to the village of *Ballston Spa*, and there delivered to and at the shop of L., a watch repairer, in order to have the same watch repaired; the said D. then, at the said village of *Saratoga Springs*, promised the said P. carefully to carry and deliver the same watch as aforesaid. But although the said D. then and there received the said watch for the purpose aforesaid, he conducted himself so negligently, &c. (*stating negligence and loss as in the last precedent*.) and the said D. did not deliver the said watch to the said L. for the purpose aforesaid.

LOAN FOR USE. *Negligently galling the back of a borrowed horse.*

That on, &c. at the village of *Saratoga Springs*, in consideration that the said P. had then delivered to the said D., at his request, a horse of the said P., for the purpose of the said D.'s riding the same horse from thence to the city of *Albany*, and thence back to the said village, the said D. then, at the said village, promised the said P., to use the said horse in a careful manner, for the purpose aforesaid. But, although the said D. received the said horse for the purpose aforesaid, yet he did not use the said horse in a careful manner, for the purpose aforesaid, but so negligently and carelessly conducted himself, in regard to the said horse, that by the mere carelessness and negligence of him the said D., the back of the said horse became and was galled, and sore, to such a degree as rendered him utterly unfit for use by the said P., for a long time, to wit, for the space of one month, besides the said P. being put to great expense, in and about feeding, keeping, taking care of, and curing the said horse, to wit, of fifty dollars, to wit, on, &c.

PLEDGING. *For carelessly losing goods pawned.*

That on, &c. in consideration that the said P., at the said D.'s request, had then and there pawned and delivered to him, a watch of the said P. of the value of fifty dollars, as and by way of pledge to the said D., for the sum of twenty-five dollars, then and there advanced by the said D. to the said P. thereon, the said D. then and there promised the said P., to take due and proper care of the said watch, until the same should be redeemed by the said P., and re-delivered to him. And, although the said D. then and there received the said watch for the purpose, and on the terms aforesaid, yet he did not take due and proper care of the said watch, until the same was redeemed and re-delivered as aforesaid; but afterwards, viz. on the day aforesaid, he, the said D., still having the custody of the same watch, for the purpose aforesaid, so negligently kept the said watch, and took so little care thereof, that in consequence of his

mere negligence in that behalf, the same watch became and was wholly lost to the said P.

Add a count on a deposit. Ante, 617.

LETTING TO HIRE. *For riding a horse improperly.*

That in consideration that the said P., on, &c. at the said D.'s request, would let to hire, and deliver to him a horse of the said P., for the said D. to go and perform a certain journey therewith, to wit, from *Saratoga Springs*, in the said county, to the city of Albany, and from thence back again to the said *Springs*, for a reasonable reward to the said P. therefor, the said D. promised the said P., that he would ride and use the same horse in a moderate, careful and proper manner, for the purpose aforesaid. And the said P. avers, that in confidence of the said promise of the said D., he, the said P., did, afterwards, to wit, on, &c. let to hire, and deliver to him the said horse, for the purpose and on the terms aforesaid. Yet the said D., in riding and using the said horse, for the purpose aforesaid, so immoderately, violently, carelessly and improperly rode and used the said horse, that thereby he was greatly hurt and injured, and so remained for a long time, to wit, for ten days, during which the said P. lost the use of him, and was put to great expense in and about feeding and taking care of the same horse, and the said horse was, moreover, greatly lessened in value thereby.

A shorter form.

That on, &c. in consideration, that the said P., at the said D.'s request, had let to hire and delivered to him, a horse of the said P., to be ridden and used by the said D., he then and there promised the said P., to ride and use the said horse in a moderate, careful and proper manner. Yet, although he then and there received the said horse, for the purpose aforesaid, yet he afterwards, to wit, on, &c. so carelessly and improperly rode and used the said horse, that thereby he became lamed and hurt, and so continued for a long time, to wit, ten days, and during that time was useless to the said P., and was, moreover, greatly diminished in value.

If there be any doubt whether the injury was occasioned by improper riding, add a count nearly similar to the last, stating the defendant's promise as follows :

That whilst he should have the use of the said last mentioned horse, as aforesaid, he would take due and proper care thereof; and averring, that the said D. had the use, &c. and that, while he so had the use, he did not take due and proper care thereof.

Add another count, omitting that it was for hire, viz. the count for lending, ante, 618, and if there be any demand for horse hire, it may be declared for, in a separate count, (which see post among the common counts,) in the same declaration.

HIRING OF WORK. *Against a watch maker, for losing a watch, delivered to him to repair.*

That the said D. before, and at the time of his promise hereinafter next mentioned, was a watch maker and repairer by trade; and on, &c. in consideration that the said P. at his request, had then and there delivered to him a watch of the said P., of the value of \$25, to be repaired by the said D. for a reasonable reward to be therefor paid him by the said P., he the said D. promised to repair the said watch, and to take proper care thereof till it should be returned to the said P.; but the said D. afterwards, on, &c., so carelessly conducted himself with regard to the said watch, that through his mere negligence, the said watch was and still is wholly lost to the said P.

Against the same.—Count for not delivering the watch.

That on, &c. in consideration that the said P., at the said D.'s request, had then and there delivered to him, he being then and there a watch maker and repairer by trade, a certain watch of the said P. of the value of \$50, to be regulated by the said D. for a certain reward to be therefor paid to him, the said D. promised to endeavor to regulate the same within a reasonable time then next following, and to re-deliver the same to the said P. whenever, after such reasonable time had elapsed, he should be thereto requested. Yet, although a reasonable time for the purpose aforesaid had elapsed, on, &c., and although the said P. then requested the said D. to re-deliver the said watch to the said P., the said D. then did, and still does, refuse so to do.

If it is thought the defendant has converted the watch, it is best to declare in case, and add a count in trover. Indeed, it seems that a loss by the bailee is itself, when unexplained, evidence of a conversion. Vide ante, 302, 3.

Against a farrier, for badly shoeing a horse.

That on, &c. the said P. had, at the said D.'s request, retained the said D. (he then being a farrier) to shoe the said P.'s horse, in consideration thereof, and a reasonable reward therefor, to be paid him by the said P., he then promised the said P. to shoe the said horse in a skilful and proper

manner, and received the said horse for the purpose aforesaid. Yet he did not shoe the said horse in a skilful and proper manner, but afterwards, to wit, on, &c., through his mere carelessness and negligence, in this behalf, the near fore foot of the said horse was pricked and wounded; and besides he then put too narrow a shoe on the said horse, and thereby and otherwise improperly shod him; by reason whereof, the said horse was, for a long time, useless to the said P., and he expended large sums in and about healing the said horse; and moreover, the said horse is much injured in his value by the cause aforesaid.

Against a carrier for the loss of a box.

That on, &c. the said P., at the request of the said D., delivered to him a box, containing apparel to the value of \$50, of the said P., to be carefully carried in the said D.'s waggon, from, &c. to, &c., and there to be safely delivered by the said D. for the said P. And in consideration thereof, and of a certain reward to him to be paid therefor, by the said P., the said D. then promised the said P. carefully to carry, convey and deliver the same box and contents, as aforesaid, and did then receive the said box and contents for the purpose aforesaid. Yet the said D. did not carefully carry the said box and contents, as he had promised as aforesaid, nor deliver the same in manner above mentioned, but afterwards, to wit, on, &c., through the mere carelessness and negligence of the said D. the said box and its contents aforesaid, became and were wholly lost to the said P.

These declarations in *assumpsit* against bailees, seek to redress the various injuries arising from their *ignorance*, *carelessness* and *fraud*, which we have noticed at large, ante, 54 to 60. And the above forms, with proper modifications, may be adapted to meet the numerous and different shapes in which these injuries may arise:

One thing, perhaps, is worthy of notice here. It is obvious that, in the above cases, *on a trial*, the plaintiff's proof will seldom, perhaps never, literally support his declaration. Indeed it *never does*, in an action on contracts *implied by law*. Thus, *that an attorney was retained at his own request*, as stated ante, 610: *that the plaintiff bargained to buy wheat of the defendant, at the defendant's request*, as ante, 612, 13: or, *that the plaintiff had promised, at his request, to accept it of him, and pay him therefor*: *id.*; *that the attorney promised diligently to defend the suit*, ante, 610: *that a watch is delivered in deposit, or to a mandatary, at the depositary's or mandatary's request, where there is no reward whatever, and that they promised safely to keep or carry the same, according to the nature of the*

bailment, ante, 617: *that the hirer or borrower of a horse promised to use him carefully*, as ante, 618, 19, are all *material allegations* in the declaration, but are seldom, and perhaps never *literally* true, and cannot *actually* be made out in proof. The same remark will apply to *requests* and *promises*, in millions of instances. And though you cannot *prove* them, yet the law will *imply all these from a certain state of facts*, and *adjudge them proved*. Thus, if I take a note as an attorney to collect; or goods as a depositary, or mandatary; or you buy wheat of me, or promise to do so; the law *implies* my request for these things. It also implies my duty to use ordinary diligence to collect the note, or to keep the goods, or my duty about them, as a depositary or mandatary, which I violate by gross neglect. Vid. ante, 56 to 60. So in all the claims, to which the following common counts are applicable, both a request and promise are implied by law. And so with regard to almost any simple contract, though it be express, certain points are implied by law, beyond what can be *literally* proved, and which points are also, generally, set forth in the declaration. Thus, a promise subsequent, to pay or perform, according to the contract on either side, is generally stated in the declaration, even in case of express contracts. This cannot, in general, be proved, but is left to be implied by law. For these implied promises, generally, vide ante, 47, 98, 108, 126 to 156. The law also implies a promise to fulfill all the duties of bailor and bailee. Ante, 56 to 60. Indeed, most of the claims in the commercial world rest upon these implied requests and promises. And they must be stated in the declaration, whether in a justice's court or court of record, or it may be objected to by demurrer. 14 John. 369.

Again, for the reasons stated, ante, 565, 566, it may be useful, sometimes, to declare in case, as for a wrong, and not in *assumpsit*, against bailees, attorneys and agents, &c. &c. This may be done. For this purpose, you omit the consideration and promise, and shape your declaration into the charge of a mere wrong. In the case of bailees, for instance, you declare *that you delivered the goods to the bailee, for a certain purpose, as in the above forms, who received them for that purpose, and then go on and state the negligence and the injury resulting from it*. In the case of attorneys, agents, &c. you merely allege, *that you gave in charge to, and retained them, to do certain business, (specifying it,) of which they assumed the charge and conduct, and then aver their negligence as in other cases*.

This distinction is more of form than of substance; but it is sometimes necessary to be understood and resorted to, with a view to other counts, or the number of parties. 3 East, 62, 70. Ante, 565, 566.

For this action on the case, against a bailee, vid. ante, 348, 349, 350.

Declaration against an agent for not accounting for goods entrusted to him to sell.

That heretofore, to wit, on, &c. in consideration that the said P., at the request of the said D., had delivered to the said D. divers goods of the said P., to wit, (*here describe the goods generally,*) of the value of fifty dollars, to be sold by the said D. for the said P., for a certain reward to the said D., in that behalf, he the said D., promised the said P., that he, the said D., would render to the said P. a full and just account of the sale of the said goods and of the moneys arising therefrom, whenever he, the said D., should be thereunto afterwards requested, after a reasonable time for that purpose should have elapsed from the time of the sale of the said goods; and the said P. avers that the said D. did afterwards, to wit, on the day and year aforesaid, sell the said goods for the said P., for divers sums of money, and that although the said P. afterwards, and after a reasonable time for that purpose had elapsed, from the time of the said sale, to wit, on, &c. requested the said D. to render a true and just account of the said sale, and of the moneys arising therefrom, to the said P., yet the said D., not regarding his said promise, hath not rendered to the said P. a just and true, or other account of the sale of the said goods, or any part thereof, or of the moneys arising from such sale, or any part thereof, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do.

If a sale by the defendant cannot be proved, the declaration should be, *that the defendant promised to account for the goods on request*, and the allegation of sale should be omitted, and the breach should be *for not accounting for the goods on request*. The above declaration does not charge upon the defendant the receipt and *non-payment* of the proceeds. The common count for *money had and received* is proper to recover the moneys received by the defendant. Although no money may have been received, so as to charge the agent with the *proceeds*, he may be liable for refusing to render an account of the sale; therefore, the above form should be adopted when it can be maintained. Vid. Chit. Prec. of Pl. 47, in notes.

Against an agent on his implied promise of authority. Vid. 6 Carr. & Payne, 508.

That heretofore, to wit, on, &c. in consideration that the said P., at the said D.'s request, would agree to purchase from one *John Doe*, through the agency of the said D., the said D. then representing to the said P. that he the said D. was the agent of the said *John Doe*, in that be-

half, certain goods, to wit, &c. at a certain price, to wit, (*here state the terms of the contract*;) the said D. then undertook and promised the said P. that he the said D. had full and competent power and authority from the said *John Doe*, to sell the said goods to the said P., on the said terms; and the said P. avers that he, confiding in the promise of the said D., did then agree, through the agency of the said D., to buy the said goods of the said *John Doe*, on the terms aforesaid, and was always ready and willing to accept and pay for the same on the terms aforesaid, and then requested the said *John Doe*, to deliver to him, the said P., the said goods upon the said terms; yet the said D. disregarded his said promise, and deceived the said P. inthis, to wit, that the said D. had not, at the time of his said promise, or afterwards, power or authority from the said *John Doe*, to sell the said goods to the said P., on the said terms; whereby the said agreement became and was void, and by reason thereof, and of the said *John Doe's* refusal to deliver the said goods to the said P., on the terms aforesaid, the said P. hath been deprived of the advantages that would otherwise have accrued to him from the completion of the said agreement.

As to an agent's liability generally, vid. ante, 71 to 85.

Declaration for a penalty given by statute to the party injured, and not to a common informer. Vid. ante, 600 to 603.

That the said D., on, &c. was indebted to the said P. in the sum of ten dollars, according to the provisions of the statute, (*here state the section, title and chapter of the statute*;) and being so indebted, he, the said D., afterwards, to wit, on the day and year aforesaid, in consideration thereof, undertook, and then and there faithfully promised the said P. to pay him the said sum of ten dollars, whenever the said D. should be thereunto afterwards requested; yet the said D. (although often requested, &c.) hath not paid the same to the said P., but hath hitherto refused and still doth refuse so to do.

Declaration for a REWARD offered by the defendant by public advertisement, for the discovery of an offender. Vid. 5 Carr. & Payne, 566. 4 Barn. & Adolph. 521, S. C. Chit. Prec. of Pl. 157, 158.

That the said D., on, &c. caused to be published a placard or advertisement, whereby, after reciting that *John Smith* had been robbed, and that there was great reason to suppose that he had been murdered, the said D. did promise, that whoever would give such information as might lead to a discovery of the murderer of the said *John Smith*, should,

on conviction, receive a reward of fifty dollars, and that any person concerned therein, or privy thereto, except the person who actually committed the offence, should be entitled to such reward, and every exertion used to procure a pardon ; by the said placard or advertisement, the said D. directed that the said information should be given, and application for such reward be made to him ; and the said P. avers that he, confiding in the said promise of the said D., and not being the party who actually committed the said offence, did, afterwards, to wit, on, &c. give to the said D. such information as led to the discovery of the murderer of the said *John Smith* ; and that afterwards, to wit, at the court of oyer and terminer held at Ballston Spa, in and for the county of Saratoga, on, &c. one *Job Strangle*, who was guilty of the said offence, to wit, the murder of the said *John Smith*, was in due course of law tried for and convicted of the said murder, in consequence of such information so given by the said P. as aforesaid ; of all which the said D., afterwards, to wit, on, &c. had notice, and was then requested by the said P. to pay him the said sum of money. Yet, &c. (*conclude as in the last form.*)

DECLARATION FOR BREACH OF A MARRIAGE PROMISE.

That on, &c. in consideration that the said P. being then sole and unmarried, at the request of the said D., had then promised the said D. to marry him when she the said P. should be thereunto afterwards requested, he the said D. then promised the said P. to marry her, when the said D. should be thereunto afterwards requested. And the said P. avers, that confiding in the said D.'s said promise, she hath always from thence hitherto remained, and still is, sole and unmarried, and hath been, for and during all the time aforesaid, and still is, ready and willing to marry him the said D. Yet the said D., after the making of his said promise, to wit, on, &c. married a certain other person, to wit, one E.

If the defendant hath not married another, an offer and request must be stated as follows :

And although the said P., after the making of the said promise of the said D., to wit, on, &c. requested the said D. to marry her, yet the said D. did not, nor would at the said time, when he was so requested as aforesaid, or at any time before or afterwards, marry her the said P., but hath hitherto wholly neglected and refused, and still doth refuse so to do.

Add a count on a promise to marry, *within a reasonable time*, and a promise to marry, *generally, without stating any time*. If the promise be to marry *at a certain time*, add a count for this accordingly.

The following forms of declarations on bills of exchange and promissory notes, are taken substantially from Chitty's Precedents of Pleading, 74 to 91, and 152 to 156. They are much more concise than those generally used, and contain, we believe, all necessary facts and averments required by the established rules of pleading :

DECLARATIONS ON INLAND BILLS OF EXCHANGE.

Drawer, being payee, against Acceptor.

That the said P., on, &c. made his bill of exchange in writing, and directed the same to the said D., and thereby required the said D. to pay to him the said P. (or "*to the order of him the said P.*") fifty dollars, two months (or "*days or weeks*") after the date (or "*after sight*") thereof, which period has now elapsed ; and the said D. then and there accepted the said bill, and promised the said P. to pay the same according to the tenor and effect thereof, and of the said acceptance thereof. Yet the said D., although often requested, &c., has not paid the same to the said P., but has hitherto refused, and still refuses so to do.

In the above case, no presentment or demand of payment need be averred, for the defendant is liable although none has been made ; and the general allegation that the plaintiff drew the bill is proper, although he drew by agent. The above form, and those which follow, do not allege that the bill *bears date* on the day named, and therefore, a mistake as to the date would seem not to be a material variance. If the bill is not *addressed* to the defendant, but is accepted by him, omit the statement of the direction, and merely aver, "*and thereby required,*" &c. In setting forth a bill or note, it is not in any case necessary to add, "*for value received,*" although these words are in the bill. Vid. Chit. Prec. of Pl. 75, 76, in notes.

Drawer, not being payee, against Acceptor.

That the said P., on, &c. made his bill of exchange in writing, and directed the same to the said D., and thereby required the said D. to pay to one *John Doe*, or order, fifty dollars, two months after the date (or "*after sight*") thereof, which period has now elapsed ; and the said D. then accepted the said bill, and promised the said P. to pay the said bill according to the tenor and effect thereof, and of the said acceptance thereof ; yet the said D. did not pay the amount thereof, although the said bill was presented to him when it became due ; and thereupon the same was then returned to the said P., of all which the said D. then had notice. Yet, &c.

Payee, not being drawer, against Acceptor.

That one *John Doe*, on, &c. made his bill of exchange in writing, and directed the same to the said D., and thereby required the said D. to pay to the said P. fifty dollars, two months after the date (or "*after sight*") thereof, which period has now elapsed, and then delivered the said bill to the said P. ; and the said D. then accepted the said bill, and promised the said P. to pay the same, according to the tenor and effect of the said bill and the said acceptance thereof. Yet, &c.

It is not necessary that the *delivery* of a bill or note to the holder be alleged, although, for greater caution, we have inserted such an allegation. 7 T. R, 596. 5 East, 477. 2 Cowen, 536.

Endorsee against Acceptor.

That one *John Doe*, on, &c. made his bill of exchange in writing, and directed the same to the said D., and thereby required the said D. to pay to the said *John Doe*, (or "*Richard Roe*,") or order, fifty dollars, two months after the date (or "*after sight*") thereof, which period has now elapsed ; and the said D. then accepted the said bill, and the said *John Doe* (or "*Richard Roe*") then endorsed the same to *John Smith*, who then endorsed the same to *James Taylor*, who then endorsed the same to the said P. ; and the said D. then promised the said P. to pay him the amount of the said bill, according to the tenor and effect thereof, and of the said acceptance and endorsements. Yet, &c.

Payee against Drawer.

That the said D., on, &c. made his bill of exchange in writing, and directed the same to one *John Doe*, and thereby required the said *John Doe* to pay to the said P., or order, fifty dollars, two months after the date thereof, which period has now elapsed, and then delivered the said bill to the said P. ; and the same was then presented to the said *John Doe* for acceptance, and the said *John Doe* then refused to accept the same ; of all which the said D. then had due notice. By means whereof the said D. then became liable to pay to the said P. the said sum of money in the said bill specified ; and being so liable, he the said D., in consideration thereof, then promised the said P. to pay him the said sum of money in the said bill specified, when he the said D. should be thereunto afterwards requested. Yet, &c.

Endorsee against Drawer.

That the said D., on, &c. made his bill of exchange in writing, and directed the same to one *John Doe*, and thereby required the said *John Doe* to pay to *Richard Roe*, or order, fifty dollars, two months after the date thereof, which period has now elapsed; and the said *Richard Roe* then endorsed the said bill to the said P., (or to one *John Smith*, who then endorsed the same to the said P.;) and the same was then presented to the said *John Doe* for acceptance, and the said *John Doe* then refused to accept the same; of all which the said D. then had due notice. By means whereof, &c. (*as in the next preceding form.*)

An averment of *presentment*, or the statement of a *valid excuse for not presenting* the bill, is essential against the drawer and endorsers. But where there has been an *excusable delay* in presenting the bill, the above form may suffice. *Notice* (or an *excuse for not giving notice*) should also be averred, as in the foregoing forms. If *no notice* has been given, it seems that an excuse must be stated, instead of the allegation of notice; but that such allegation will suffice in cases where a notice has been given, though the time of giving it was *delayed*, in consequence of the defendant's residence not being known at the time. Vid. Chit. Prec. of Pl. 78, in notes.

Endorsee against Endorser.

That one *John Doe*, on, &c. made his bill of exchange in writing, and directed the same to one *Richard Roe*, and thereby required the said *Richard Roe* to pay to the said *John Doe*, or order, fifty dollars, two months after the date thereof, which period has now elapsed; and the said *John Doe* then endorsed the said bill to the said D., (*who then endorsed the same to one John Smith.*) who then endorsed the same to the said P.; and the same was then presented to the said *Richard Roe*, for acceptance, and the said *Richard Roe* then refused to accept the same; of all which the said D. then had due notice. By means whereof, &c. (*conclude as in above form of payee against drawer.*)

The foregoing are all the forms of declarations on bills which it is deemed necessary to insert. Many more, adapted to a great variety of cases, may be found in Chit. Prec. of Pl. 74 to 89. The mode of declaring against the various parties to a bill being, in many cases, so nearly similar to that upon *promissory notes*, the following forms of declarations upon the latter, may be easily shaped to meet the like cases arising upon the former:

DECLARATIONS ON PROMISSORY NOTES.

Payee against Maker.

That the said D., on, &c. made his promissory note in writing, and thereby promised to pay the said P., or order, fifty dollars, two months after the date thereof, which period has now elapsed. Yet the said D., although often requested, &c. has not paid the said sum, or any part thereof, and has hitherto neglected, and still does neglect to pay the same.

I have omitted the allegation of *delivery* in the above form, and shall do so in those which follow. It is not necessary. Vid. ante, 627. Although a note be made by many persons *jointly and severally*, yet if one only be sued, it may be stated that *he only* made the note, without noticing the other makers. A note, "I promise to pay or cause to be paid," may be declared on as a note in the common form. Vid. Chit. Prec. of Pl. 152. As to the omission of the words, "for value received," vid. ante, 626.

Endorsee against Maker.

That the said D., on, &c. made his promissory note in writing, and thereby promised to pay to one *John Doe*, or order, fifty dollars, two months after the date thereof, which period hath now elapsed; and the said *John Doe* then endorsed the said note (*to one Richard Roe, who then endorsed the same*) to the said P., whereof the said D. then had notice, and then, in consideration of the premises, promised to pay the amount of the said note to the said P., according to the tenor and effect thereof. Yet, &c. (*conclude as in last form.*)

Endorsee against Payee or other Endorser.

That one *John Doe*, on, &c. made his promissory note in writing, and thereby promised to pay to the said D., (or "*Richard Roe*,") or order, fifty dollars, two months after the date thereof, which period has now elapsed; and the said D. (or "*Richard Roe*") then endorsed the said note (*to James Jackson, who then endorsed the same*) to the said P.; and the said *John Doe* did not pay the amount of the said note, although the same was presented to him on the day when it became due; of all which the said D. then had due notice. Yet, &c. (*conclude as above.*)

The above form may be easily shaped to meet the case of an action by an *endorsee* against any one or all of a number of *endorsers*. You continue the statement of the various endorsements from one to the other, through any number of *endorsers*, as in the foregoing form. Thus,

suppose your action is against the *third endorser*, you will then aver, "that the said *Richard Roe* (the *payee and first endorser*) then endorsed the said note to *James Jackson*, and the said *James Jackson* then endorsed the same to the said D., and the said D. then endorsed the same to the said P." (conclude as in next preceding form.) If the action be against *all the endorsers*, the form will be the same, except it would be well to precede the name of each, with "*the said defendant*"—thus, "*the said defendant Richard Roe,*" &c. And, in the breach, you will state notice to have been given "to each of the said *defendants,*" &c. using the plural number throughout.

The same form of stating endorsements, is in all cases applicable to a note payable to bearer, when such note is transferred by *endorsement*, instead of *delivery*. And *endorsements, demands and notices*, in suits upon bills of exchange, are also stated in the same manner, with the difference, of calling them *bills* instead of notes. Vid. forms, ante, 626 to 628.

The *endorsements* are also stated in the same form, in an action by the *holder* of a note against the *maker*. And though a promissory note be endorsed long after it fall due, it may be declared on as endorsed when it was due. Vid. 5 Cowen, 476.

Holder against Maker, on note payable to bearer.

That the said D., on, &c. made his certain promissory note in writing, and thereby promised to pay to *John Doe*, or bearer, fifty dollars, two months after the date thereof, which period hath now elapsed; and the said *John Doe* then delivered, transferred and assigned the said note to the said P., and he then became and was, and still is the lawful bearer thereof; and the said D. in consideration of the premises, then promised to pay the amount of the said note to the said P., according to the tenor and effect thereof. Yet the said D. &c. (*as before.*)

Payee against Maker of note payable by instalments, where the whole sum is due.

That the said D. on, &c. made his promissory note in writing, and delivered the same to the said P., and thereby promised to pay to the said P. fifty dollars, in manner following, viz. twenty dollars, on the first day of February, in the year aforesaid; twenty dollars, on the first day of March, in the year aforesaid; and the remainder of the said sum of fifty dollars, on the first day of April, in the year aforesaid, all which periods have now respectively elapsed. Yet the said D., although often requested, &c. has not paid the said sum of fifty dollars, or any part thereof, and has hitherto neglected and still does neglect to pay the same.

• *The like where a part only is due.*

This form will be like the last, except that instead of the allegation, "all which periods have now respectively elapsed," it will be stated, "and although the periods for payment of the said first and second instalments, (the instalments in arrear, according to the fact,) have respectively elapsed; yet the said D. although, &c. has not paid the same or either of them, or any part thereof," &c.

Before leaving the subject of bills, and notes, I take this occasion to give a form of bond to be given by the party seeking to maintain an action or set off upon a *lost bill or note*. Vid. ante, 182, 183. 2 R. S. 327, 328.

FORM OF BOND TO INDEMNIFY AGAINST A LOST BILL OR NOTE.

Know all men by these presents that we, JOHN DOE, RICHARD ROE, and JAMES JACKSON, are held and firmly bound unto JOHN SMITH, in the sum of one hundred dollars, to be paid to the said JOHN SMITH, or to his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the first day of July, 1840.

The condition of this obligation is such, that if the said JOHN DOE, shall indemnify and save harmless the said JOHN SMITH, his heirs and personal representatives, against all claims, by any other person, on account of a certain promissory negotiable note, (*or bill of exchange*), executed by the said JOHN SMITH to the said JOHN DOE, for the sum of fifty dollars, (*state the amount as near as may be*), dated, (*the date as near as may be*), payable, (*state as near as may be how and when payable*), and against all costs and expenses by reason of any such claim, then this obligation to be void, otherwise of force.

JOHN DOE, [L. s.]
RICHARD ROE, [L. s.]
JAMES JACKSON, [L. s.]

In presence of
RANSOM COOK, Justice. }

Another mode of declaring upon *bills* or *notes* is, to adopt the *general money counts*, the forms of which we shall presently give. Where the plaintiff joins a count on the *bill* or *note*, with the *money counts*, in the same declaration, he may elect, on the trial, under which count he will

prove the instrument, and if he fail on the count setting forth the bill or note, from the circumstance of not having described it properly, or any other cause, which does not destroy the operation of the note, he may then elect to apply it to the money count. 18 John. 14.

The use and advantage of using these counts upon a bill or note, were considered, ante, 231 to 234, together with the cases in which they are admissible.

Whenever the plaintiff is entitled to recover under a declaration directly upon a bill or note, or upon a bill or note transferred—either as between the original parties, or, in virtue of such transfer, as between the parties not original—he may omit all description of, or allusion to, such instrument, in his declaration, may declare in the money counts only, and give the instrument and transfer or transfers thereof in evidence, which will, in itself, be sufficient evidence to maintain such action. Vid. 12 John 90. 3 John. Cas. 5. Ante, 232, and cases there referred to in notes.

Under this rule, it is obvious, that where there is the least difficulty or nicety in declaring specially upon the instrument itself, or the transfer thereof, the money counts, for greater caution, should always be joined in the same declaration with the special count, or else be adopted as the only counts in the declaration.

Nor is it an objection, that this general mode of declaring subjects the defendant to an unfair surprise, for he may always protect himself against this, by demanding a bill of particulars, in the manner we shall hereafter notice, which demand the justice is bound to allow as a matter of right, and in answer to which, the plaintiff is obliged to state, briefly, the bill or note upon which he claims, with the several endorsements. 12 John. 94. Tidd's Pr. 534.

COMMON COUNTS.

Use and occupation.

That the said D. was indebted to the said P. in twenty-five dollars, for the use and occupation of a certain piece of land, by and at the request of the said D., and by the permission of the said P., for a long time then elapsed, used and occupied by the said D., and being so indebted, the said D. afterwards, on the day aforesaid, promised the said P. to pay him, the said sum of twenty-five dollars, when he should be thereto afterwards requested. Yet the said D., although often requested, &c. (*breach is the same as in count on bill, note, &c.*)

On these common counts, the plaintiff is never held, in *proof*, to the *precise sum* stated.

In a count for use and occupation, it is never necessary to be precise, in stating the *place* where the premises lie. It is better not to state a place; for, if stated, the plaintiff will be held to it in proof, and a mistake will be fatal to the action. 6 East, 348. 1 Esp. R. 273.

The above form for use and occupation can easily be adapted to use and occupation of any other description of premises, as a *building*, a *room*, a *landing*, a *barn*, a *stable*, a *garden*, &c. &c. For the action for use and occupation, generally, *vid. ante*, 153 to 156.

These common counts, after commencing the declaration as directed, *ante*, 590, all run as in the above form for use and occupation, *viz.* "that the said D. was indebted, &c." down to the sum stated: "in the sum of twenty-five dollars," or "fifty dollars," or other sum, as the plaintiff chooses to state, in order to cover his demand. And the *breach* is always in this form: "Yet the said D., although often requested, &c. has not paid the said sum of twenty-five dollars, or any part thereof, to the said P., but the same to pay has hitherto refused, and still does refuse."

With these remarks, I shall, in giving the common counts, merely state the *cause of action*.

I shall give no form for what are technically called the counts on a *quantum meruit* and *quantum valebant*, for the reason given in 2 Saund. 122, n. 2; *viz.* that counts with a *price stated*, will, in all cases answer the same purpose.

COMMON COUNTS CONTINUED.

For divers tolls and duties due from the said D. to the said P., for the passage of divers waggon, carts and other carriages of the said D. over a certain toll bridge of the said P., situate in the towns of *Moreau* and *Fert Edward*, on the *Hudson River*.

For toll of bridge.

For divers tolls and duties due from the said D. to the said P. at a certain turnpike gate of the said P. at the town of *Halfmoon*, in the said county, for divers cattle and carriages of the said D., which before that time had travelled on the said road, through the gate aforesaid.

Do. of turnpike.

For divers goods, wares and merchandize, by the said P. before then bargained and sold to the said D. at his request.

For goods bargained and sold.

This form can be easily adapted to crops, as grass, turnips, corn, potatoes, timber, &c. bargained and sold : and to fixtures.

When this count is applicable, vide ante, 98, 9. 1 East, 194. 1 Ves. jun. 530.

Goods sold, &c. For divers goods, wares and merchandize, before then sold and delivered by the said P. to the said D. at his request.

For this action, generally, vide ante, 98 to 108.

This may be adapted to crops, standing timber, fixtures, &c., as mentioned of the count for goods bargained and sold ; thus :

Crops sold, &c. For a certain crop of grass, (or *for certain standing timber, or for certain fixtures, &c.*) before then sold and delivered by the said P. to the said D. at his request.

For necessaries. For meat, drink, washing, lodging, and other necessaries, before then found and provided by the said P. for the said D. at his request.

Horse meat, &c. For horse meat, stabling, care and attendance before then found, provided and bestowed, for, in and about the feeding and keeping of divers horses, mares and geldings, of and for the said D. at his request.

Pasturing, &c. For the depasturing and feeding divers cattle by the said P. before then depastured, in certain pastures of the said P., for the said D., and at his request.

Hire of horses, carriages or goods, &c. For the use and hire of divers horses and carriages, bridles, saddles and harness, and of divers chairs and other carriages, (or, *of certain plate, linen, china, furniture, beds and bedding, or goods and chattels, &c.*) before then let to hire and delivered to the said D. at his request.

Lighterage, wharfage, and ware-house room. For the lighterage, wharfage and ware-house room of divers goods, wares and merchannize, by the said D. before then shipped and landed, in and by certain lighters and other vessels of the said P., and deposited and kept, in and upon

a certain wharf and certain ware-houses and premises of the said P. for the said D., and at his request.

For the good will of a certain business of the said P., before then relinquished and given up by the said P., to, and in favor of the said D., at his request.

The good will of business.

For the work and labor, care and diligence of the said P., before then done, performed and bestowed, in and about the business of the said D., for the said D., and at his request.

Work and labor generally.

For the work and labor, care and diligence, &c. (*as in the last count*) and for divers materials and other necessary things used and provided in and about that work and labor, by the said P. for the said D., and at his request.

Work, labor and materials found.

For this action generally, *vid. ante*, 108 to 126.

This general mode of declaring, as in the two last counts, will suffice in all cases, without stating the *kind of services*, though the latter may be done, if it be thought best.

Thus: attorneys, counsellors, solicitors, surgeons, farriers, physicians, clergymen, hired servants, sailors, ship's officers, pilots, clerks of court, agents of all kinds, carriers, factors, surveyors, school teachers, justices, constables, &c. &c., may, in actions for their fees, wages and materials found, in the course of their business, declare in the above general form, and give their special services in evidence. If, however, they prefer stating the particular kind of service for which they sue, it is easy to state the capacity in which they were performed, by adding after the word "*bestowed*," in the above count for *work and labor*, the words "as attorney," "counsellor," or "physician," &c. *Vid.* 2 Saund. 350, n. 2. 1 Chit. Pl. 304.

I remarked, *ante*, 67, that, "in all cases, if the agreement be not under seal, though it be never so special and multifarious, if the services be performed under it, and the agreement thus fulfilled, or if the agreement be rescinded, the plaintiff need not, in an action, set it forth, and declare upon it specially; but may claim and recover under a general count for *work and labour*." This should be understood with the qualification that the services are, by the agreement, to

be paid for in *money*, and that the money is actually due, by the terms of it. Vid. 1 Chit. Pl. 303. Vid. also 10 Mass. R. 287, 289. And in all the like cases, whether such stipulated price be due for services. or goods, &c. a general count, according to its nature, for work, &c., or goods sold, &c., will be good, without setting forth the special agreement. 7 Cranch, 299. Bull. N. P. 139.

On an award. Upon and by virtue of an award made by one *John Doe*, on a submission before then made by the said P. and the said D., to the award and determination of the said *John Doe*, concerning certain matters in difference then depending between the said P. and the said D., and upon which said submission the said *John Doe* awarded that the said D. should pay to the said P. the said sum of money.

COMMON MONEY COUNTS.

For money lent. For so much money by the said P. before then lent and advanced to the said D. at his request.

Money paid, &c. For so much money by the said P. before then paid, laid out and expended, for the use of the said D., at his request.

Money had and received. For so much money by the said D. before then had and received, to and for the use of the said P.

Of the action for money lent and advanced, generally, vid. ante, 152, 3. Of the action for money paid, &c., vid. ante, 148 to 152. Of the action for money had and received, vid. ante, 126 to 148.

When the common money counts are proper upon bills of exchange and promissory notes, vid. ante, 231 to 234, also, ante, 631, 2.

On an account stated, or balance struck upon settlement.

That the said P. and the said D., on, &c. accounted together, of and concerning divers accounts and sums of money, from the said D. to the said P., before then due and owing, and then in arrear and unpaid; and upon such accounting, the said D. was then found in arrear, and indebted to the said P. in the sum of fifty dollars.

Where your claim is under several of the above common counts, instead of giving them the appearance of distinct and separate counts in your declaration, you may consolidate them all in one, and recover whatever you can prove under all, or any of them, thus :

That on, &c. the said D. was indebted to the said P. in two hundred dollars, for the work and labor of the said P., before then performed for the said D., and at his request ; and for goods, wares and merchandize by the said P., before then sold and delivered to the said D., at his request ; and for money by the said P., before then lent and advanced to the said D., at his request ; and for other money by the said P., before then paid, laid out and expended by the said P., to and for the use of the said D., at his request ; and for other money by the said D., before then had and received, to and for the use of the said P. (*and so on, with a count for use and occupation, a balance struck, &c. &c.*)

That this may be done, vid. 4 John. 280 ; 13 id. 483.

It is provided by statute, vid. 2 R. S. 449, § 23, that "Whenever any submission to arbitration shall be revoked by a party thereto, before the publication of an award, the party so revoking, shall be liable to an action by the adverse party, to recover all the costs, expenses and damages which he may have incurred in preparing for such arbitration. But neither party shall have power to revoke the powers of the arbitrators, after the cause shall have been finally submitted to them, upon a hearing of the parties, for their decision." The next section provides, that "If the submission so revoked, was contained in the condition of any bond, the obligee in such bond shall be entitled to prosecute the same, in the same manner as other bonds, with conditions other than for the payment of money, and to assign such revocation as a breach thereof ; and for such breach, he shall recover as damages, the costs and expense incurred, and the damages sustained by him in preparing for such arbitration." By the next section it is provided, that "No other sum, penalty, forfeiture or damages shall be recovered for any revocation of a submission to arbitration, than such as are prescribed in the two last sections ; notwithstanding any stipulated damages, penalty or forfeiture, contained in such submission, or any other instrument, or agreement collateral thereto." Independently of the above statutory provisions, no doubt an action could be sustained on the submission for revoking the arbitrator's power. Vid. post, *Plea of Arbitrament and Award*. The statute is, therefore, in this particular, nothing more than declaratory of the common law ; it is, however, valuable and worthy of attention, as defining with accuracy

and precision the rights and liabilities of parties submitting their differences to arbitration. This action of *assumpsit* is maintainable on the revocation of a submission by *parol*, or *not under seal*. If the submission be contained in the condition of a bond, then the action should be covenant upon the condition.

Declaration against a party revoking a submission to arbitrators.

That on, &c. by a certain agreement, (*in writing*), then made by and between the said P. and the said D., it was, amongst other things, agreed by and between the said P. and the said D., that they would submit the matters in controversy then existing between the said P. and the said D., respecting certain money claimed by the said P. to be due from him the said D. (*or respecting certain unsettled accounts and matters between them, according to the terms of the agreement*), to the final award and determination of A. B., C. D., and E. F., arbitrators chosen by the said parties, so as the said arbitrators should make their award, *in writing*, ready to be delivered to the said parties, or such of them as should require the same, on or before the — day of — then next. And thereupon, afterwards, to wit, on the day and year first above mentioned, in consideration of the premises, and that the said P., at the said D.'s request, had then promised the said D. to perform the said agreement, in all things to be performed by the said P. by virtue thereof, the said D. then promised the said P. to perform the same in all things to be by him, the said D., performed by virtue thereof. And afterwards, to wit, on, &c. the said arbitrators proceeded upon the said submission so as aforesaid made, and the said parties then appeared before the said arbitrators, and proceeded to the trial and investigation of the matters so submitted to the said arbitrators as aforesaid. And afterwards, to wit, on the same day and year last aforesaid, after the said investigation was commenced, and before the cause was finally submitted to the said arbitrators, the said D. revoked the said submission, *by a revocation in writing*, whereby the powers of the said arbitrators in the premises, ceased and were annulled, and whereby also the said D. sustained great damage, to wit, fifty dollars for his costs, expenses and damages, in employing and paying counsel, subpoenaing and paying witnesses, and in otherwise preparing for the trial of the said cause before the said arbitrators. Which said costs, expenses and damages the said D. then became liable to pay to the said P.; and being so liable, he the said D., on the day and year last aforesaid, promised the said P. to pay him the said sum of fifty dollars, when he should be thereunto afterwards requested. Yet, &c.

Declaration by the assignee of a chose in action, the assignor being dead.

Vid. 2 R. S. 274, § 5. Ante, 553, 4, note.

The said plaintiff, assignee for a valuable consideration of the promissory note, (or bond, or other chose in action, or of the several promises and undertakings, or causes of action, hereinafter set forth,) hereinafter mentioned, pursuant to the "Act relative to voluntary assignments of choses in action," passed May 2, 1835, complains of the said defendant, for this, to wit: (*Proceed to state the cause of action as in other cases, the different forms for which may be gathered from those already given. After the cause of action is fully stated, then, and before setting forth the breach, insert the following averment:*) And the said P. in fact says, that after the making, (of the said several promises and undertakings,) and delivery of the said promissory note, (bond, &c.) by the said D. to the said E. F., (the person to whom the note, &c. was given,) to wit, on, &c. he, the said E. F., assigned the said note to the said P. for a valuable consideration, and afterwards, to wit, on, &c. died; and that there are no executors or administrators appointed upon his estate;" or, "and that his executors," (or "administrators,") naming them, "have no interest in the said note so assigned as aforesaid to the said P.;" or, "have refused to prosecute for the same." Conclude by stating breach in the ordinary form.

If an action of assumpsit be brought by a *surviving creditor*, vid. ante, 553; or against a *surviving debtor*, vid. ante, 555; by or against *husband and wife*, vid. ante, 554, 556, for a debt or demand due before marriage; by *assignees* of an insolvent debtor, vid. ante, 554; or by an *executor or administrator*, vid. ante, 554,(1); instead of alleging *that the defendant promised, or was indebted to the plaintiff*, the declaration should be varied according to the *fact*. Thus, in an action by a *surviving creditor*, it must be stated *that the said defendant promised, or was indebted to the said A. and B., whom the said A. hath survived; by husband and wife, that the said defendant promised, or was indebted to the said A., while sole and*

(1) We stated, ante, 554, that executors or administrators must all join, and cannot sue separately. For a further authority to that point, not there cited, vid. 5 Wen. 313, where it is held, that where there are several executors, they must all join, *even though some renounce*. Vid. also 2 R. S. 365, § 1, which authorizes executors or administrators to maintain actions for *wrongs* committed to the property, rights or interests of their testator or intestate, against the wrongdoer, and after his death, against his executors or administrators. The provision, however, does not extend to actions for slander, libel, assault and battery, false imprisonment, or to actions on the case for injuries to the person of the plaintiff or to the person of the testator or intestate. Id. § 2.

unmarried; by assignees, &c. that the said defendant promised, or was indebted to the said C., before the said assignment to the said A. and B., the plaintiffs, (which assignment, together with the proceedings which led thereto, are to be previously set forth;) by an executor or administrator, that the said defendant promised, or was indebted to the said E. F., deceased, in his life time. And the breach is, that the defendant refused to perform his promise, (negating the performance according to the fact, or to pay to) the said A. and B., in the lifetime of the said B.; or to perform his promise, &c. or to pay to the said A., since the death of the said B., whom the said A. hath survived; to perform his promise, &c. or to pay to the said A., while sole and unmarried, or to perform his, &c. or to pay to the said A. and B., since their intermarriage; to perform his promise, &c. or to pay to the said C., before the said assignment, or to perform his promise, &c. or to pay to the said A. and B., since the said assignment; to perform, &c. or pay to the said E. F., deceased, and to perform, &c. or pay to the said executor or administrator, since his death, &c.

And so where the action is *against a surviving debtor*, the *promise, or debt*, is charged as having been *made by, or due from, the said C. and D., whom the said C. hath survived*, and the refusal to perform, or pay, is charged upon *the said C. and D., during the lifetime of the said D., and by the said C., since his death.*

Where the action is *against husband and wife*, the *promise or debt* is charged upon the *wife, while sole*, and the breach is alleged of *her, while sole*, and of *her and her husband*, since the intermarriage between them. And so of the like cases.

In these cases, the forms of stating the contract, or indebtedness, are the same as we have given above, with this difference only, it must appear to have arisen or existed between *other parties, according to the fact*, and the declaration must also show, that the *present* plaintiff has the right to sue, in his *present* character; or that the *present* defendant is liable to be sued in the character in which he is brought before the court.

If, however, there have been an actual promise to the party suing, it is proper, and in many cases indispensably necessary, to state such promise to have been made by the defendant to him in his character of survivor or representative, &c. Thus, suppose I hold a claim on simple contract, as executor against you, which is of more than six years standing, and is therefore barred by the statute of limitations, but you have made an acknowledgment or promise to me as executor, *within six years*, which (as we have seen, ante, 47,) will do away the bar arising from lapse of time; I must state your promise to me, in the declaration, in order to prevent

the effect of your bar, for I cannot reply this to your plea of the statute, and thereby sustain my action, and, if an issue be joined on a promise, within six years, made to the testator, I cannot give your promise to me in evidence, and consequently, if I omit to state your promise to me in the declaration, your bar will be good, and I must fail on account of the omission. And so, if you had, in such case, taken the benefit of the insolvent act, but had afterwards promised me, as executor, to pay me the debt, which would revive your liability, notwithstanding your discharge, *vid. ante*, 47; yet I must state your promise to me, *directly*, in my representative character, or the omission will be fatal, as in the former case, and so, of an assignee of an insolvent, a surviving creditor, &c. &c. *Vid. 3 East*, 409. *Willes*, 29. 2 *Str.* 890. *Ld. Raym.* 1101.

Where the plaintiff declares, as *executor or administrator*, it is necessary in point of form, to make a profert of the letters *testamentary*, or letters of *administration*, granted by the surrogate. This is usually done at the close of the declaration, thus :

Form of a profert of letters testamentary.

And the said P. brings into court here, the letters testamentary of the said A., deceased, whereby it appears that the said P. is executor of the last will and testament of the said A., deceased.

Of letters of administration.

And the said P. brings, &c. the letters of administration, of *John W. Thompson, Esq.* surrogate of the county of Saratoga, by which it appears that the said P. is administrator as aforesaid.

The making profert, or exhibiting these letters, is, in order that the defendant may see and be satisfied that the plaintiff has a right to sue in the character which he assumes. Of profert and oyer, generally, *vid. ante*, 596, note (1.) 12 *John.* 401.

A REVIEW OF THE POINTS DECIDED UPON CERTIORARI, IN RELATION TO A
DECLARATION IN A JUSTICE'S COURT IN THE ACTION OF ASSUMPSIT.

A declaration in assumpsit may be demurred to, for not stating a day. 14 *John.* 369. *Vid.* 2 *Cowen*, 487, 8, and n. (a.) 3 *Wen.* 75. 12 *id.* 375. 13 *id.* 283.

So, for not stating a request. And accordingly, where a declaration was for work and labor, goods sold, money paid, &c. and services, as a physician, without averring a *request* by the defendant, (as we have uniformly done, in the like cases, in the forms which we have given,) the

defendant demurred; and because the justice overruled the demurrer, the judgment was reversed, (*for this and other causes.*) 14 John. 369.

And it seems, that to declare for work and labor, without alleging that it was done *for the defendant*, would be bad on demurrer. 1 John. 276.

But unless the objection be taken by demurrer, a judgment for the plaintiff thereupon will be sustained on certiorari, for the supreme court will intend, that the want of such averment was supplied by proof on the trial. *id.*

The declaration on a special agreement was utterly uncertain, being as follows: "for damages, on account of the defendant's not fulfilling a contract for a certain lot of land lying in *German Flats.*" Though this would clearly have been bad on demurrer, yet it was held well, after a judgment thereupon for the plaintiff in the court below, it not having been there objected to; and every defect was intended to have been supplied by proof. 3 Caines, 219.

The plaintiff may state, generally, that the defendant is indebted to him, and exhibit his account, and this shall be deemed a part of his declaration, and will aid in rendering it more certain. *id.* 187.

And if such account exceed \$1,25, and appear on its face to be for tavern expenses, the judgment will for that reason be reversed, unless the plaintiff also show that the defendant was either a traveller or a lodger in his house. *id.*

Where the declaration is upon a book account generally, and the plaintiff at the same time exhibits a written account of items, such a declaration is good; and on appeal, evidence should be received that the account thus exhibited was returned by the justice, and filed with his return, although not attached thereto. 3 Wen. 492.

Where the declaration was "for work and labor, in burning three hundred bushels of lime," omitting both the usual averments, that it was "done for the defendant" and "at his request," though the declaration would have been bad, if objected to by demurrer, 14 John. 369; yet this not being done on certiorari, the averments were intended to have been supplied by proof at the trial. 2 John. 210. And where the declaration was in this general form—"Plaintiff declares against the defendant for one barrel of salt, \$5; one note of hand—bal. of accounts for different kinds of liquors—claims \$50," omitting the usual averments of *time, place* and *request*; to which declaration the defendant demurred *generally*, the declaration was held good on certiorari. The demurrer should have been special. 2 Cowen, 437, 8, and n. (a).

Even where a count for *fraud* and a count upon *contract* were joined in the same declaration, and the defendant pleaded and went to trial, in-

stead of demurring, it was held that this cured the defect in the declaration. 3 John. 486.

The plaintiff, by way declaration, stated to the justice, without writing, that he "claimed a certain book account, and also for a settlement of four several notes, which the defendant had received from him to collect, and that his principal object in the action was a settlement of the notes, which the defendant had detained against good faith, to the plaintiff's damage, \$25." Although this declaration was very uncertain, in not stating the *amount of the notes*, nor whether the defendant had *collected* or *converted* the notes, or *lost* or *otherwise disposed of them*, yet, after verdict and judgment in the court below, as the defendant had not demurred, but pleaded and gone to trial, all these averments were intended on certiorari to have been supplied by proof at the trial. 9 John. 368.

Where the plaintiff declares, in different counts, for the sum of \$25, so as in the whole to exceed the jurisdiction of the justice, he ought, it seems, regularly to show in his declaration the proper credit, to reduce the sum within that jurisdiction; but if no objection be made on this account, at the time of declaring, this will cure the defect. 1 John. Cas. 333.

But such a declaration will be even good upon demurrer, if the claim of damages at the conclusion be within the jurisdiction of the court. *id.* 25, 333. 3 Caines, 174.

A written promise to pay, founded on a past consideration, was alleged, without stating such consideration, to have been *on request*, which would have been clearly bad on demurrer, ante 48, 376; yet, where the declaration was not demurred to for this reason, but the defendant pleaded to issue, and went on to trial, the defect was held to be cured by his so doing, and the supreme court, on certiorari, intended a request from the beneficial nature of the consideration appearing upon the return. 10 John. 243.

If the plaintiff allege that he *let* the defendant have a horse, in consideration whereof the defendant *let* him have another, it shows with sufficient certainty an *exchange*, and not a *bailment*. 3 Caines, 152.

Where the plaintiff declared on a special contract, it was held, that he could not recover upon evidence applicable to the general counts only, such evidence being objected to. 7 Cowen, 231.

The declaration, if objected to before the justice, must be good in form as well as substance; and if upon demurrer, he adjudge it good, when in fact it was defective in form or substance, his judgment will be reversed. 13 Wen. 283.

The common pleas should, on the trial of an appeal, disregard a variance between the pleadings before the justice and the evidence offered, when it is manifest that no one will be prejudiced. 15 Wen. 669.

SECONDLY. DECLARATIONS IN TRESPASS ON THE CASE, PROPERLY SO CALLED.*Against an attorney for negligence in not putting a note in suit.*

That the said P. on, &c. delivered to the said D. a promissory note, dated the 10th May, 1839, for \$70, made by one L. H., payable to the said P., to be collected by the said D. as an attorney, who then received the same for the purpose aforesaid. That during one year after the said note was so delivered and received as aforesaid, the said L. H. was residing within the state of New-York, to wit, at the town of Saratoga Springs, in the county of Saratoga, and during all that time was amenable to process, and might have been sued by virtue of process issued upon the said note. Yet the said D., well knowing the premises, carelessly and negligently omitted to issue any kind of process upon the said note, or otherwise to cause the same note to be put in suit during the said year, or at any time since, and the said L. H. has failed in his circumstances, and become insolvent. And the said P. avers, that through the said mere carelessness and negligence of the said D., the said note has become and is wholly lost to the said P.

For fraud in the exchange of horses.

That on, &c. the said P. bargained with the said D. to exchange with him a horse of the said P. for a horse of the said D., and to pay the said D. \$20, as and for the difference in price of the said horses, on the said exchange, being, in the whole, a good and sound price for the said D.'s said horse, and the said D. then well knowing his said horse to be unsound and unfit for use, falsely and fraudulently affirmed to the said P. that the said D.'s said horse was sound for any thing he knew to the contrary; and thereby falsely and fraudulently exchanged his said horse for the said D.'s said horse, and \$20, as aforesaid; and the horse of the said D. at the time of the said exchange thereof, was unsound and unfit for use, to the knowledge of the said D., and hath so ever since remained.

On a sale for a fraudulent concealment.

That on, &c. the said P. bought of the said D. his certain horse for the sum of \$70, then paid therefor, and the said D. well knowing the said horse to have the heaves, which fact was then unknown to the said P., he, the said D., then intentionally, falsely and fraudulently concealed the said fact from the knowledge of the said P., and thereby sold the said horse to him for the price aforesaid. And the said horse of the said D., in fact, at the time of the said sale thereof, had the heaves, to the knowl-

edge of the said D., and was thereby rendered, and so hath since continued, utterly unfit for use.

In this last declaration, I have, for the reasons stated ante, 331, 2, in note, omitted the allegation that the *plaintiff* agreed to risk the soundness of the horse. The case of *Mellish v. Matteux*, there cited, has never, that I am aware of, been followed by any English or American case. The true rule would seem to be, as stated ante, 310, 11, that "If a man sell me goods or chattels of any kind, as animals, carriages or provisions, and there be any unsoundness, breachiness, trickishness, &c. in the animals, or unsoundness or other defect in the carriages or provisions, unknown to and unperceivable by me, but which is known to the vendor; if he represent the article free from defect, or even forbear to mention such defect, but intentionally conceal it from me, he is guilty of fraud, and liable to me in an action on the case." And even where the sale is with all faults, if the seller use any artifice to disguise them, and to prevent their being discovered by the purchaser, he would be liable in this action. Vid. ante, 331, note. This is undoubtedly the extent to which our courts would go in a case like that last supposed—a sale with all faults. It is not to be supposed that, in such a case, they would hold a seller responsible for damages arising from unsoundness, of which he has not apprised the purchaser at the time of the sale. The rule above quoted, therefore, applies only to general sales, and not to those of the latter description, where the buyer is expressly told that he must take the goods at his own risk.

On a sale with all faults, where fraudulent means are used by the seller to prevent the purchaser from discovering the unsoundness of a horse.

That on, &c. the said D. was possessed of a certain horse, and which said horse before and at the time of the sale thereof to the said P., as hereinafter mentioned, had contracted a certain malady and unsoundness, rendering the said horse of no use or value, to wit, the glanders, and which the said D. then well knew; yet the said D. intending to defraud the said P. in this behalf, by then falsely, fraudulently and deceitfully using certain false and fraudulent acts, contrivances and applications, to make the said horse appear to be a sound horse, and not glandered, and by suppressing the appearance of the said glanders, then sold the said horse, so being unsound and glandered as aforesaid, to the said P., the said P. to risk the soundness of the said horse; and the said P. not knowing that the said horse was so unsound and glandered, was thereby induced to buy and then bought the said horse of the said D., and then paid to him

a large sum, to wit, one hundred dollars, as and for the price and value of the said horse, *and was also thereby induced to agree with the said D. to risk the soundness of the said horse, as aforesaid*; whereas, in truth and in fact, the said horse, at the time of the said sale as aforesaid, was unsound and glandered, and of no use or value whatever.

This declaration may easily be shaped to meet the case of any other fraudulent concealment, whether the sale be general, or "*with all faults.*"

In these declarations for a fraud, it is safest to omit the consideration of the contract, *vid. ante*, 591, for if stated, the plaintiff would doubtless be held to strict proof thereof. It may safely be omitted, as was decided in *Barney v. Dewey*, 13 John. 224. In that case, a declaration to the following effect, was determined to be good on special demurrer:

Another form of declaration for a fraud in a sale of goods.

That the said D., on, &c. intending to deceive and defraud the said P., did encourage him to buy a certain bay horse, then in the said D.'s possession, of the value of one hundred and fifty dollars, and falsely and fraudulently affirmed, that the said horse belonged to him the said D., and thereby caused the said P. to buy the said horse, which the said D. delivered as his horse, and the said P., confiding in the said D.'s affirmation, purchased said horse of him, and satisfied him therefor, whereas, in truth, at the time of said affirmation and delivery, the said D. was not owner of said horse, and had no right to sell him, but the horse belonged to one T. D., and the said D. well knew the same, to the said P.'s damage, &c.

As to implied warranty of title, *vid. ante*, 318. *Vid. also, ante*, 616.

This declaration may be easily varied to meet the case of any other fraudulent affirmation.

I have given forms of declarations in cases of deceit in selling and exchanging *horses*, as familiar instances. The same form will answer for any other case of deceit in sales.

For this action upon deceit in sales, generally, *vid. ante*, 310 to 332.

DECLARATION for falsely representing a third person as fit to be trusted.

That on, &c. one *Richard Roe*, applied to the said P., and then requested the said P. to sell certain goods, on credit, to the said *Richard Roe*, and the said P. being then unacquainted with the circumstances of the said *Richard Roe*, the said D. well knowing the premises, and that the said *Richard Roe* was then in bad and insolvent circumstances, and

unfit to be trusted with goods on credit, then falsely and fraudulently informed the said P., that he, the said D., knew the said *Richard Roe*, and that he believed him to be good, (thereby meaning, that he believed him to be in good circumstances, and fit to be trusted with goods on credit,) in consequence of which information, the said P., not knowing the contrary, did, afterwards, to wit, on, &c. give credit to the said *Richard Roe*, and did sell to him one cow of the value of twenty-five dollars, on credit, whereas, in truth, at the time of the said information so given as aforesaid, the said *Richard Roe* was in bad and insolvent circumstances, and not fit to be trusted with goods on credit, and in truth, the said D. did not believe him to be good, but knew him then to be in bad and insolvent circumstances, and not fit to be trusted with goods on credit, and the said sum of money is now wholly unpaid to said P., and the said P. is likely wholly to lose the same.

On the subject of this action for a fraudulent representation, as to the credit of another, *vid. ante*, 332 to 334. *Vid. also* 8 Bingh. 33. 3 T. R. 51. 1 East, 318. 2 *id.* 92. As to the action on the case for fraud in inducing the plaintiff to employ an agent not trustworthy, *vid.* 6 Bingh. 396; 7 *id.* 105; 4 Moore & Payne, 741, S. C. An action on the case lies, at common law, for a *false* representation as to the character, credit, or circumstances of another person, in order that he may obtain credit, &c. provided the party making the representation *knew* it was untrue, and the party to whom it was made, relied upon the representation and sustained an *injury*, by trusting the person recommended. 3 T. R. 51. In such case, it is not necessary to prove that the defendant was actuated by direct malice against the plaintiff, or anticipated any pecuniary advantage to himself. *Vid.* 6 Bingh. 396. 7 *id.* 105. The person respecting whom the representation is made, is a competent witness for the plaintiff. 1 Campb. 277. 3 Stark. R. 47. Ryan & Moody, 48.

By the Proprietor of a barouche against the Driver, his servant, for injuring one of the horses by careless driving.

That the said P., on, &c. retained and employed the said D., at his request, for reward to him, to drive and manage a certain carriage, to wit, a barouche, and two horses of the said P., for him the said P., and as his servant, and the said D., by virtue of such retainer, then drove and managed, and had the charge of the said carriage and horses, and thereupon it then became and was the said D.'s duty to drive and manage the said carriage and horses in a careful and proper manner, and to take due and reasonable care thereof, whilst he so had the charge of the same; yet the said D. then

drove and managed the said carriage and horses in a careless and improper manner, and did not take due or reasonable care thereof, and by reason of the carelessness, improper conduct, and breach of duty of the said D., in the premises, one of the said horses, being of the value of one hundred dollars, then became and was greatly cut, bruised, wounded and injured, and one of its legs then became and was fractured and broken, and the said horse was rendered and is of no use or value to the said P., and thereby he hath lost divers gains and profits which would otherwise have accrued to him from the use of the said last mentioned horse, and thereby, also, the said P. then incurred divers expenses, to wit, twenty dollars, in having the said horse examined and taken care of, and in hiring another horse in lieu thereof, for a long time, to wit, from thence hitherto.

This declaration may be varied to suit the case of any other injury to the horses or carriage. As to the liability of servants, *vid. ante*, 334, 363. *Vid. also Chit. Prec. of Pl.* 573, 574.

Against a Constable for an escape on a warrant.

That on, &c. one *Richard Roe* was indebted to the said P., in the sum of twenty-five dollars, on a certain cause of action, before then accrued to him, and, being so indebted, the said P. for the recovery thereof, afterwards, to wit, on, &c. sued and prosecuted out of the court of the people of the state of New-York, before *Ransom Cook*, Esq. then one of the justices of the peace of the said county, a warrant directed to any constable of the said county, commanding him to take the said *Richard Roe*, and bring him before the said *Ransom Cook*, to answer the said P., in a plea of trespass on the case, to his damage of fifty dollars, which said warrant, afterwards, to wit, on, &c. was delivered to the said D., then one of the constables of the said county, to be executed in due form of law. By virtue whereof, afterwards, to wit, on, &c. the said D. then being constable as aforesaid, took and arrested the said *Richard Roe*, by his body, and afterwards, on, &c. against the will of the said P., voluntarily suffered the said *Richard Roe* to escape, and go at large, out of his custody, the said D. then being constable as aforesaid, the aforesaid debt then and still being wholly unpaid, and the said P. is, by reason of said escape, likely wholly to lose the same, and has already lost the means of recovering his said costs and charges, in and about his said suit.

Under the allegation of a voluntary escape, a negligent one may be proved. 2 T. R. 126. Burr. 2614. 1 Saund. 39, n. 1.

On the subject of this action for an escape generally, *vid. ante*, 336, 7, 8, 600.

Where a person is already arrested, and in the custody of the law thereupon, a constable, who has suffered him to escape from a previous arrest, is deprived of the power of reclaiming him. 6 John. 62.

Leaving the defendant behind after an arrest, and taking his promise to come on, or to appear before the justice at another time, is a voluntary escape, and the constable cannot retake him. *id.*, and *vid. ante*, 337.

Where a defendant had given security, on the adjournment of a cause, to *appear and answer*, and, in default thereof, to pay the debt, or damages and costs to be adjudged to the plaintiff; it was held, that he might be removed from the limits of a jail, to which he had been subsequently committed in another cause, and brought before the justice on a *habeas corpus*, to save the surety from liability; and that such leaving of the limits would not subject the sheriff to an action for an escape. 7 Wen. 132.

The assent of an officer to the escape of a defendant, does not affect the rights of the plaintiff, and even the officer, if the process be *mesne*, may retake the defendant. 10 Wen. 514. *Vid. ante*, 337.

The statute, 2 R. S. 224, § 21, limiting suits against sheriffs for escapes of persons imprisoned on civil process to one year, applies as well to escapes after arrest and before commitment, as to escapes after commitment. 7 Wen. 459.

For not arresting the defendant.

The same as in the last, down to the delivery of the warrant, and then as follows:

And, at the time of the delivery of the said precept to the said D., and for more than thirty days afterwards, the said *Richard Roe* was within the said county, and the said D. might have taken and arrested him upon the said precept, if he would so have done, whereof he, so being constable as aforesaid, during all that time, had notice; yet the said D. did not, nor would, neither hath he at any time before bringing this suit, taken and arrested the said *Richard Roe* upon the said precept, as he was thereby commanded; the said P.'s said debt then and still being wholly unpaid.

Of the action for not serving writs, precepts, &c. *vid. ante*, 325, 6.

This action also lies against a constable for not levying an execution of the goods and chattels of a defendant when directed so to do, but, instead thereof, committing the defendant to prison. 7 Wen. 236.

Declaration for the defendant's dog biting the plaintiff's sheep.

That the said D., on, &c. was the owner or possessor of a certain dog, which dog afterwards, to wit, on the day and year aforesaid, killed ten sheep and five lambs of the said P., of the value of twenty dollars, and grievously bit and wounded ten other sheep and five other lambs of the said P., of the value of twenty dollars; which said sheep and lambs, so bit and wounded as aforesaid, were thereby rendered useless, and of no value to the said P.

It is not necessary, in the above declaration, to aver notice to, or knowledge by the owner or possessor, that his dog was mischievous or disposed to kill sheep. Vid. 1 R. S. 701, § 9. Vid. also ante, 344. In all other cases of injuries by dogs, bulls and other domestic animals, except in the single instance of injuries to sheep, notice or knowledge must be averred and proved. Ante, 342, 3.

Our remarks, ante, 344, were in print before the report of the case of *Maxwell v. Palmerton*, 21 Wen. 407, was published. That case establishes the rule, in opposition to what was suggested by us at the page referred to, that a ferocious dog, running at large, and a terror to the neighborhood, may be killed by any one, and that the owner can recover nothing in an action for the trespass, although he had no knowledge or notice of the vicious propensities and habits of the dog.

For keeping a ferocious dog, or suffering it to go at large, which attacked and injured the plaintiff.

That the said D. on, &c., wrongfully and injuriously kept a certain dog, he, the said D. then well knowing that the said dog then was used and accustomed to attack and bite mankind, [or "knowing that the said dog then was of a fierce, ferocious and mischievous nature, and that it was dangerous and improper to allow the said dog to go at large and unconfined,* and not properly secured,"] and which said dog, whilst the said D. kept the same, to wit, on the day and year aforesaid, did attack, bite, wound and injure the said P., (or, *if the allegation between the brackets be inserted, instead of the averment that the dog was used to attack mankind, say from the asterisk, "yet the said D., whilst he kept the said dog as aforesaid, to wit, on the day and year aforesaid, wrongfully, carelessly and improperly suffered the said dog to go at large and unconfined, without being properly secured, and without taking due and proper care or precautions to secure the same in that behalf, and which said dog did then attack, bite, wound and injure the said P.,"*) and thereby the said P. became and was sick, sore, lame and disordered, and so remained and

continued for a long space of time, to wit, from thence hitherto, and thereby the said P. became and was, during all that time, unable to do or perform his necessary affairs and business, and also by means of the premises, the said P. then incurred divers expenses, costs and charges, to the amount of twenty dollars, in and about the endeavoring to get cured of the said wounds, injuries, sickness, lameness and disorder, so occasioned as aforesaid, and incidental thereto, and the said P. hath been and is, by means of the premises, otherwise greatly damnified.

For injuries occasioned by the defendant's ox running at the plaintiff.

That the said D. on, &c. was possessed of a certain ox, and then by his servants in that behalf, had the care and management of the said ox ; and the said ox on the day and year aforesaid was wild and vicious, and it was then unsafe and improper to drive, or permit or suffer the said ox to go through any public highway, without causing or procuring the said ox to be tied down and confined, or otherwise secured, so as to prevent the said ox from doing mischief or damage to any person or persons passing along or being in such highway ; of all which the said D. before and on the day and year aforesaid, had notice ; yet the said D. then wrongfully, injuriously, carelessly, negligently and improperly, by his said servants, drove, and caused and procured to be driven, the said ox, so being wild and vicious as aforesaid, in a certain highway, wholly untied, unbound and unconfined, and not properly secured, and without taking due and proper care in that behalf ; by means whereof the said ox then, with great force and violence, ran at and against the said P., who was then passing in and along the said highway, and then threw down and greatly bruised, hurt and wounded the said P., insomuch that by means thereof, he the said P. then became and was sick, (*conclude as in next preceding form.*)

For this action at large, vid. ante, 341 to 346.

Declaration for a nuisance in erecting a hog-sty near the plaintiff's house.

That the said P. and D. were, on, &c. and from thence hitherto have been, and now are, respectively and severally possessed of two certain adjoining lots of land, in the village of, &c. and the said P., with his family, during all the time aforesaid, in a certain dwelling house, near to the said lot of the said D., actually dwelt with his family ; and on, &c. the said D., on his lot aforesaid, erected a certain hog-sty, and continued the same, during all the time aforesaid, with certain hogs therein, so near

the said dwelling house of the said P., that thereby certain noxious, offensive and unwholesome smells, vapors and stenches, during all the time aforesaid, ascended and came upon the said lot, and into the said dwelling house of the said P., and greatly annoyed and incommoded the said P. and his family, in their habitation of the same dwelling house, whereby the comfort of the said P., and his family, was greatly diminished, and their health much injured.

Of this action for a nuisance, vid. ante, 346, 347, 348.

For harboring and concealing the plaintiff's wife.

That on, &c. the said P.'s wife, Mary, without his consent, went away from him, and went to the said D., who, well knowing the premises, received her and kept and concealed her from the said P., from the day aforesaid, until the commencement of this suit, and wholly refused to deliver her to the said P., or to discover her place of residence; but unlawfully entertained and harbored her, during all that time, whereby the said P. was, during all that time, and still is, deprived of her society, assistance and service, in and about his domestic affairs.

The same form, with a slight variation, will do for harboring and detaining the plaintiff's child or servant, whereby he loses their assistance and service, on which subjects, vid. ante, 350 to 362.

For criminal conversation.

That the said D., contriving and wrongfully, wickedly and unjustly intending to injure the said P., and to deprive him of the comfort, fellowship, society, aid and assistance of *Alice*, (*the wife's christian name*,) the wife of the said P., and to alienate and destroy her affection for the said P., heretofore, to wit, on, &c. and on divers other days and times after that day and before the commencement of this suit, wrongfully, wickedly and unjustly debauched and carnally knew the said *Alice*, then and still being the wife of the said P., and thereby the affection of the said *Alice* for the said P., was then alienated and destroyed; and also by means of the premises, the said P. hath thence hitherto wholly lost and been deprived of the comfort, fellowship and society of his said wife, and of her aid and assistance in his domestic affairs, which the said P. during all that time ought to have had, and otherwise might and would have had.

For this action generally, vid. ante, 351 to 354.

Declaration for debauching the plaintiff's daughter and servant.

That on, &c. and on divers other days and times, between that day, and the day of the commencement of this suit, the said D. debauched and carnally knew Sarah, the said P.'s daughter, then, and during all the time aforesaid, the daughter and servant of the said P., whereby she became pregnant and sick with child, and so remained and continued for a long space of time, to wit, for nine months, then next following, when she was delivered of the child whereof she was so pregnant, to wit, on, &c. by means of which premises, she the said Sarah, from the day and year first above mentioned, hitherto became, and was unable to perform the necessary affairs and business of the said P., her father and master as aforesaid, and thereby he was, during all that time, deprived of her service, as aforesaid, and was afterwards put to great expense in and about nursing and taking care of the said Sarah, and in and about the delivery of the said child.

This action may be *case* or *trespass*. *Case* is, however, the usual remedy. Vid. 6 Munf. R. 587. 1 Halst. 332. 8 Serg. & Rawle, 36. 3 id. 215. 2 Wen. 459. 5 Greenl. R. 446.

For the law on this subject generally, vid. ante, 354 to 359. Vid. also Bac. Abr. Master and Servant, O. 2 Starkie's Ev. 721, tit. Seduction.

By a Master for enticing away a Servant or Apprentice.

That on, &c. one *John Doe* was, and from thence hitherto has been, and still is, the servant (or "apprentice") of the said P., in his trade and business of shoemaker, which the said P. then exercised and carried on, and still does exercise and carry on, at Saratoga Springs, in the county of Saratoga; yet the said D. well knowing the premises, but contriving, and wrongfully and unjustly intending to injure, prejudice and aggrieve the said P., in his aforesaid trade and business, and to deprive him of the service of the said *John Doe*, as such servant (or "apprentice") of the said P., as aforesaid, and of the profits, benefits and advantages, which might and would otherwise have arisen and accrued to him from such service, whilst the said *John Doe* was such servant (or "apprentice") of the said P., as aforesaid, to wit, on the day and year aforesaid, unlawfully, wrongfully and unjustly enticed, persuaded and procured the said *John Doe*, so then being the servant (or "apprentice") of the said P., as aforesaid, to depart from and out of the service of the said P., by means of which said enticement, persuasion and procurement, and on no other account whatsoever, the said *John Doe* then unlawfully, wrongfully and un-

justly, and without the license or consent, and against the will of the said P., departed from and out of the service of the said P., and hath remained and continued absent from such service for a long space of time, to wit, from thence hitherto; whereby the said P. hath, for and during all that time, lost and been deprived of the service of the said *John Doe*, in his, the said P.'s, aforesaid trade and business, and of all the profits, benefits and advantages which might and would otherwise have arisen and accrued to him from such service, and hath been and is, by means of the premises, otherwise greatly injured in his aforesaid trade and business.

It would be well to add to this declaration a count for harboring the servant or apprentice.

For this action generally, *vid. ante*, 361.

And in regard to this action on the case, *vid. the following authorities*, in addition to our remarks and the cases cited in a preceding part of this volume: For *maliciously* refusing a plaintiff his vote at an election, 11 John. 114; 1 N. H. R. 88. Not against one for *defrauding* another by his *perjury* as a witness, 3 John. 157. For *deceit* in selling land, 13 John. 325, 395; 2 Day's R. 381; 1 id. 22; 1 Anth. N. P. 11; 11 Taylor's R. 1. For damage in *laying the foundation of a house*, 3 Wen. 154; 17 John. 92. For *nuisances*, 4 Ohio R. 376; 3 Caines, 307; 17 Mass. R. 296; 16 id. 313; 13 John. 507; 2 Root's R. 208; 1 id. 129. For *continuing* a nuisance, 10 Mass. R. 72. For *diverting a water course*, 1 McCord's R. 543. By a landlord against one for wrongfully and maliciously *disturbing* his tenants, so that they leave the premises and he *loses his rents*, 1 Hall's Super. Ct. R. 210. Against a *ferryman for injuring a horse* by his negligence, 1 Nott & McCord, 17. For defendant's horse *injuring* plaintiff's cattle, 3 Halst. R. 267. Where, by defendant's bad fences, plaintiff's cattle escaped, 6 Mass. R. 90. For *removing property* to defraud a plaintiff of his *seizure on execution*, 11 John. 136, 149. For *exciting a dog to bite*, 6 Dowl. & Ryl. 275. Against a *physician for unskilful treatment*, 2 Root's R. 90. For *crim. con.*, 1 McCord's R. 209. For selling a chattel by an agent for *less* than he was *instructed to sell*, 16 John. 74. For asserting a *lie* to plaintiff's injury, 2 Wen. 385; 1 Root's R. 164. Against a *printer, for neglecting to publish* a notice, 9 Mass. R. 484. For the above enumeration of cases where this action will lie, *vid. Yates' Pl.* 357, 8.

We are obliged to omit many forms of declarations, not only in this, but in the other forms of action treated of in the preceding pages. Our object has been to give such as will be found most useful, and of the most frequent occurrence, in justices' courts.

THIRDLY. DECLARATION IN TROVER.

That the said P., on, &c. was possessed, as of his own property, of one gold watch, of the value of fifty dollars; and being so possessed thereof, afterwards, to wit, on, &c. casually lost the same, and the said watch, afterwards, to wit, on, &c. came to the said D.'s hands and possession by finding. Yet the said D., well knowing the premises, hath not (although often requested so to do) delivered the said watch to the said P., but afterwards, to wit, on, &c. converted the same to his own use.

This form is universally applicable in all the variety of cases where trover lies, for which action, generally, vid. ante, 284 to 304.

The *losing* and *finding* is a mere fiction of law, for the ease of declaring, and the defendant is never allowed to traverse or deny these two allegations, or either of them. Vid. ante, 574.

IV. DECLARATIONS IN TRESPASS.

Trespass on lands.

That on, &c. and on divers other days and times between that day and the time of the commencement of this suit, the said D., with force and arms, &c. a certain close of the said P., situate, lying and being in the town of Saratoga Springs, in the said county, abutted and bounded as follows, viz. easterly on lands in the possession of T. A., &c. (*describe the farm or lot which was trespassed upon, in such particular or particulars, as shall distinguish it from any close upon which the defendant may have a right to enter, in the same town,*) broke and entered, and with his feet in walking, and with divers cattle, to wit, horses hogs and sheep, trod down and destroyed the grass and herbage there growing, and ate up, trampled upon and destroyed the corn of the said P. there growing, and other injuries to him then and there did, against the peace of the people of the state of New-York.

The plaintiff may, if he choose, declare in the general form, which I have given ante, 579, describing the close as lying in such a town generally. And this is the usual form; because, if from the nature of the defendant's plea, it should become necessary to be more specific, the plaintiff may do this in his *replication*, called a *new assignment*, for which also, vid. ante, 580. Vid. also 11 Wen. 642, 647. 8 id. 503. 12 id. 207.

And the plaintiff may *newly assign* before the justice, where a plea of title is interposed, although the statute requires that the suit in the court of common pleas shall be for the same cause of action. id. But if he

declare, without describing the close by metes and bounds, or in some other particular and definite manner, and the defendant pleads or gives notice that the title to lands will come in question, and complies with the requirements of the statute in such cases, and the plaintiff neglects to reply as above suggested, the defendant would, on a trial in the court above upon such general declaration, be entitled to a verdict, on showing title in himself, or in a third person from whom he had a license to enter, to any lands situate in the town where the trespass was alleged to have been committed. *id.* And it would be well, in these cases, that the declaration should be reduced to writing, though this is not necessary. If by parol, the justice should write down the description of the premises; otherwise the title may never be tried. And in one case, where the declaration, which was by parol, was general, and, on the requirement of the defendant, a verbal description of the premises was given, leave was granted by the supreme court to amend the declaration, by inserting the true description as stated orally before the justice. 12 Wen. 207.

In the declaration in this action of trespass, if the injury were done to a house, then, in lieu of the word *close*, say *house*.

Any other injury, as well as that done to corn and grass, must be set out. I mention them as the most usual. Cutting and carrying away the wood and timber then and there growing, or destroying the fences, fruit trees, driving away horses, cattle, sheep, hogs, &c. &c. or, indeed, any other specific injury, distinct from the entry, must be mentioned in the declaration.

The above form is universally applicable, whether the defendant himself actually enters, or his agents, servants or cattle, &c.; for the law makes it *his entry and act*, and it must be so alleged. Thus, a declaration that the defendant's *agent, servant, or cattle*, entered, &c. would be bad, at least as an argumentative allegation, *vid. post*, and might be specially demurred to; for all this might be, and yet the defendant have no hand in the business. The *agent* or *servant* might have entered of his own head, in which case the defendant would not be liable, *vid. ante*, 560, or the cattle, &c. might have been let out for a certain time to another. It should, therefore, be alleged, in these cases, that the defendant *himself* entered, and by his cattle, &c. did the injury complained of. *Ante*, 374.

In trespass, for cutting or carrying away wood or timber, if the plaintiff mean to recover *treble damages*, under the statute, 2 R. S. 261, 262, § 1, it is essential that the declaration conclude in this form, 8 John. 342:

“Contrary to the form of the statute in such case made and provided.”

And where, instead of a *general reference* to the statute, the plaintiff in his declaration recited and referred his claim to the old statute of 1805, which had been repealed, it was held that he could not recover treble damages under the statute of 1813. And such would now be the case should the plaintiff refer to the statute of 1813. It is, therefore, better in all cases that the reference should be general, as above suggested.

In an action of trespass for cutting timber, where the declaration contained several counts besides the count under the statute, and the verdict was general, it was held that the plaintiff was not entitled to treble damages. 2 Wen. 247.

For this action of trespass generally, *vid. ante*, 364 to 420.

Declaration for entering the plaintiff's house, &c.

That the said D., on, &c. with force and arms, the house of the said P., in the town, &c. broke and entered, and the door of him the said P., of the value of ten dollars, then and there broke, tore and despoiled, and other wrongs, &c. (*as in the last.*)

In trespass for the battery of a servant.

That the said D., on, &c. with force and arms, &c. made an assault on E. F., then and still being the daughter and servant of the said P., and then beat, bruised, wounded, and ill treated the said E. F., insomuch that by means thereof the said E. F. then became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time, he, the said P., lost and was deprived of the service of his said daughter and servant, and of all the benefit and advantage which might and would otherwise have arisen and accrued to him from such service.

For this action generally, *vid. ante*, 354, 361, 362.

For adultery with the plaintiff's wife.

That the said D., on, &c. and on divers other days and times, between that day and the time of commencing this suit, with force and arms, &c. assaulted and ill treated A. B., then and still being the wife of the said P., and debauched and carnally knew her, whereby he the said P., for a long space of time, to wit, from the day and year first above mentioned, hitherto hath wholly lost and been deprived of the comfort, fellowship, aid and assistance of his said wife, in his domestic affairs, and other wrongs to the said P., then did, against the peace, &c.

For this action generally, vid. ante, 350 to 354.

In these two last cases, and those of a like nature, the action may be either *trespass* or *case*. Vid. ante, 350, 351. Chit. Prec. of Pl. 540, 570, 717, 718.

In trespass for taking goods, &c.

That on, &c. the said D., with force and arms, &c. certain goods and chattels of the said P., viz. one calf, of the value of five dollars, one plough of the value of ten dollars, took and carried away, and to his own use converted, against the peace of the people, &c.

For this action generally, vid. ante, 420 to 450.

THE CONCLUSION OF A DECLARATION.

To the damage of the said P., of fifty dollars.

State this at whatever sum will cover the damages supposed to have been sustained, not exceeding the justice's jurisdiction.

In the case of wrongs, if the plaintiff sue as survivor, state the wrong as done to P. and D., "*whom the said P. hath survived*," and if the action be by or against *husband* and *wife*, vary the declaration according to the fact; for it should always appear upon its face, why the wife is joined. 2 Caines, 221.

The above is the universal conclusion, in all actions cognizable before a justice. And, in general, this round sum in damages, stated at the conclusion, is sufficient, without showing more particularly what the damages are. To this rule, however, there are many exceptions, especially in an action for a wrong, which has occasioned the division of *damages* into two kinds: *general* and *special*. *General* damages are such as the law implies to have accrued from the wrong complained of, and may be recovered under the above general conclusion. *Special* damages are such as *really* took place, and are not implied by law. The latter may arise as the consequence of some act, from which the law implies damage, or they may be the very foundation of the action; but in both instances, it is necessary to show particularly by the declaration, how they arose, and to trace them from the injury complained of. Thus, in an action of trespass for taking a horse, by which the plaintiff is damaged, amongst other causes, by being put to expense, or paying money in order to regain the possession; if he merely state the trespass in the taking, and conclude in *general* damages for so much, he cannot recover the money thus laid out, but it is necessary to state particularly in his declaration *that by rea-*

son of the trespass he was obliged to pay a sum of money, (stating an amount sufficient to cover his expenses,) in order to regain the possession of his said horse ; for the law will not imply, nor can any body see this, from the mere act of wrongfully taking ; and it should, therefore, be stated with the circumstance of time and place, the same as any other material fact, in order that the defendant may be prepared to meet such a charge ; else the plaintiff can recover no more than his general damages. Holt, 700. Cowp. 418. 8 T. R. 133. And so of the like cases.

But under the *general allegation* in an action of trespass, "*and other wrongs then and there did,*" &c. some matters may be given in evidence, in aggravation of damages, though not specified in any part of the declaration ; Bull. N. P. 89 ; Holt, 699 ; for the circumstances which accompany and give character to a trespass, may always be proved, to enhance the damages beyond the pecuniary loss sustained by the plaintiff ; therefore, in an action of trespass for taking away goods, where it appeared that the defendant opened the plaintiff's chest containing her wearing apparel, and made use of language in relation thereto, calculated to wound her feelings ; it was held, that these circumstances were proper to be considered in assessing the damages. 7 Conn. R. 275, 279, per Hosmer, Ch. J. and the cases there cited. Vid. also 7 Harr. & John. 67. 1 Ala. R. 52. Within this rule, in an action of trespass for breaking and entering his house, the plaintiff may show the debauching of his daughter, or the battery of his servants under the general allegation ; Bull. N. P. 89 ; Holt, 699 ; 6 Mod. 127 ; but not the loss of their service for that reason, or any other matter, which would in itself sustain an action ; for then it should be stated specially. And therefore, in trespass for entering the close, the plaintiff could not, under this general allegation, give evidence of taking away a horse, &c. Bull. N. P. 89. Holt, 700. 1 Salk. 643. 1 Str. 61. 1 Sid. 225.

But when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is *essential* to the validity of the declaration that the resulting damage should be shown with particularity ; as in an action by a master for beating his servant, in which the allegation of a loss of service by reason thereof, or expense in cure, &c. are material. 9 Co. 113, a. 1 Saund. 346, a, b, n. 2. 2 East, 154 ; and vid. further, ante, 354, 5.

OF THE USE OF SEVERAL COUNTS IN A DECLARATION.

A declaration may consist of as many different counts as the case requires; and the damage which the plaintiff recovers, may be either a round sum upon the whole declaration, or so much under one count, and so much under another, in distinct sums. Per De Grey, Ch. J. 3 Wils. 185. And it is usual, particularly in assumpsit, and actions on the case, to set forth the plaintiff's action in various shapes, in different counts, so that if the plaintiff fail in the proof of one count, he may succeed on another. 3 Bl. Com. 294, 5. Thus, in a special action of assumpsit for not doing some act, which the defendant has engaged to do, if the defendant promised to do it upon a particular day, the first count is framed accordingly; but for fear the plaintiff should not be able to prove such particular promise, it is usual, where the evidence may probably support the allegations, to add a count to do it on request; another, to do it in a reasonable time; and another, to do it generally; and so if it be to do the act, at a particular time and place, the first count is to be adapted to such facts, and the second to deliver on request, or generally, and the third within a reasonable time; and it is frequently advisable to declare in different counts, the one on an executory, the other on an executed consideration, the first to admit of evidence of the defendant's stipulation at the time of the inception of the contract, the other of subsequent admissions or promises. Vid. 1 Chit. Pl. 351, 2, and authorities there cited. For the reason given ante, 640, 1, it is also many times advisable to add a count containing a promise directly to an executor, administrator, &c. besides the usual one, stating the original promise, in order to avoid a plea of the statute of limitations, insolvency, &c. And so in a great variety of cases, it is prudent for the plaintiff to diversify his counts in actions upon contract.

In declarations for *wrongs*, several counts for the same cause of action are also frequently advisable. Thus, in trespass for entering the plaintiff's close, if there have been a taking and carrying away of personal property, it is usual to insert two counts; in the first, charging an injury to the land, and taking the goods there; and in the second, charging merely the asportation of the goods; and where there has been an asportation of personal property, (which, in case of roots, earth, timber or other matter affixed to the freehold, must be an actual carrying away, vid. ante, 284, 420,) from the land where the same was dug or cut, &c. and not a mere conveyance of it to another part of the premises, where the same was dug, cut, &c. it is expedient to join the two counts, one for *entering*

the close &c. and the other simply for *taking* and *carrying away* the personal property ; and so in any cases which may arise, where it is doubtful which of several modes of declaring the proof will sustain, several counts should be incorporated in the same declaration, in order to meet the proof in the several possible shapes, in which it is expected. Vid. 1 Chit. Pl. 353, 4, and the authorities there cited.

These counts are in the nature of distinct declarations, and each must in itself, therefore, independently, contain all the necessary allegations to sustain an action, either in its own terms, or by express reference to a former count. Bac. Abr., Pleas and Pleading, (B) 1.

As to the class of counts which may be properly joined, vid. ante, 561 to 564.

Upon the whole, if the cause pass on to a trial, and judgment for the plaintiff, *without* objection to the declaration, in examining it upon certiorari, (whatever nicety herein *may be* exacted while the parties are in the court below,) it is difficult to conceive of a case, as we have seen by the authorities to which we have from time to time adverted, in which it appears from the return that the merits have been fairly tried, where any defect whatever in the declaration would operate as the cause of a reversal. Vid. also 2 Bos. & Pull. 259, 60, per Lord Eldon, *as to the question how far declarations will be aided by verdict, even in courts of record*. And though, where the declaration (none of the evidence being returned) was, that the defendant "*privily, wilfully and maliciously, by certain conduct, damaged the plaintiff to the amount of \$25,*" the judgment was reversed, on account of its palpable defects in almost every thing ; yet, even in this case, where it did not appear what the cause of action was, or whether it might not have been slander, or some other matter, of which the justice had no jurisdiction, the court intimate, that had the evidence been returned, and it had thereby appeared to have been properly within the justice's jurisdiction, &c. the decision would have been otherwise. 1 Caines, 486. So, the judgment was reversed, where husband and wife were joined, without any reason appearing therefor in the declaration. 2 Caines, 221. But it would probably have been otherwise, had the reason appeared merely from the evidence returned.

SECTION XI.

PROCEEDINGS WHERE JUSTICE IS A MATERIAL WITNESS.

A justice can never be a witness in his own court, neither can he act upon facts within his own knowledge, as evidence in the cause. Whenever, therefore, the defendant wishes to avail himself of the testimony of the justice, a course of proceeding is pointed out by the statute for that purpose; and if he make out a proper case, in the opinion of the justice, a judgment of discontinuance should be entered, as directed in the section of the statute cited below. It should be remarked that the provisions of the statute apply only to the defendant. If the plaintiff require the testimony of the justice, it is his own fault if he commence his suit before him; he should have proceeded before another justice. The provision of the statute is in these words—Laws of 1838, p. 232, § 1: "If previous to joining issue in any cause, (except where the defendant shall have been arrested by warrant,) the defendant shall make affidavit that the justice, before whom the same is pending, is a material witness for such defendant, without whose testimony he cannot safely proceed to trial, and shall set forth therein the particular facts and circumstances which he expects to prove by the justice, judgment of discontinuance shall be entered, if the justice shall be satisfied that he is a material witness for the defendant, and that without his testimony the defendant cannot safely proceed to trial, and not otherwise, but without costs against either party."

It will be seen that the affidavit required to be made by the defendant is to be made previous to the joining of issue, that is, before the defendant pleads to the declaration, unless indeed he should plead a special plea which calls for a replication, in which case the issue would not be joined until the plaintiff replies. In such a case, therefore, perhaps the defendant might plead specially, and then tender his affidavit. Nothing would, however, be gained by such a proceeding; and it is therefore proper, in all cases, that the affidavit should be made when the declaration is put in, *and before plea*. The affidavit should not, in strictness, be made until the plaintiff declares; for the defendant cannot know until then for what claim the suit is prosecuted. I make this remark in analogy to the practice of obtaining orders for bills of particulars of plaintiffs' demands in courts of record, though perhaps the same reasons do not fully apply to

this case. Vid. 1 Chit. R. 724, note (a). Indeed, it is easy to suppose a case where the greatest hardship might be suffered by a defendant, if he should be required to wait for the declaration before making his affidavit. If he should be sick, or absent from the county on the return day of the process, or the like, it would be manifestly unjust to deny him the benefits of the statute, provided a sufficient excuse for his non-attendance appear upon the face of the affidavit, and if it also appear that he has not mistaken the nature of the plaintiff's action. ~

The provisions of the statute do not apply to actions commenced by process of warrant, and hence in such cases the defendant is obliged to proceed, however important or material the justice's testimony may be to him.

The defendant must set forth in his affidavit "*the particular facts and circumstances which he expects to prove by the justice.*" These facts and circumstances will of course vary, according to the nature of each particular case. They should be stated with accuracy, particularity and precision, in order that the justice may judge of their pertinency and materiality; for he must be satisfied that he is a material witness, and that without his testimony, the defendant cannot safely proceed to trial, that is, that his testimony is indispensable to the defendant, before he is authorized to enter a judgment of discontinuance. If the justice should refuse to enter judgment upon the affidavit, such refusal might be a ground of error, and the common pleas would, on certiorari, if satisfied that the justice had erred in this particular, reverse a judgment for the plaintiff. And even if the defendant should plead and go to trial before the justice, after an unsuccessful attempt to procure a judgment of discontinuance, and the trial should result in a judgment against him, he might avail himself of such refusal as a ground of error on certiorari; for the fact of his putting in a plea would not amount to a waiver. Vid. 17 Wen. 85, 87.

The judgment is to be entered *without costs against either party*. The justice should note the facts in his docket, in a short way, thus: *On the — day of — parties appear. Plaintiff declares in assumpsit, &c. and the defendant makes affidavit of my materiality as a witness, according to the statute. Being satisfied that I am a material witness as stated in the affidavit, on file, thereupon judgment of discontinuance without costs against either party.* Each party is liable to the justice for the costs made by them respectively, but no execution can be issued to enforce their collection.

FORM OF AFFIDAVIT THAT JUSTICE IS A MATERIAL WITNESS.

JUSTICE'S COURT.

Richard Roe }
 ads. } SARATOGA COUNTY, ss.
 James Jackson. }

Richard Roe, defendant in the above entitled cause, being duly sworn says, that *RANSOM COOK*, Esq. the justice of the peace before whom the said cause is pending, is a material witness for this deponent in the said cause, and that he cannot safely proceed to the trial thereof without the testimony of the said justice. And this deponent further says, that he expects to prove by the said justice, the following facts and circumstances, to wit: that on the — day of — inst., a few days after the summons in this cause was served upon this deponent, the said plaintiff admitted to this deponent, in the presence of the said justice, that he the said plaintiff owed this deponent five dollars for borrowed money, which he the said plaintiff was willing to allow this deponent as a set off against his the said plaintiff's claim against this deponent. And deponent further says, that he is unable to prove the said admission or indebtedness by any other person than the said justice, (*except by one John Smith, who is now absent from the said county, and without the jurisdiction of this court, and is not expected to return in several months,*) or (*if the action be trespass on lands, state, after the words, "in the presence of the said justice"*) that he the said plaintiff, gave this deponent liberty to enter upon the premises of the said plaintiff, described in the said plaintiff's declaration, but that he this deponent had acted unfairly, and he the said plaintiff meant to make him suffer for it. (*Set forth the facts and circumstances particularly, according to the facts.*)

RICHARD ROE.

Sworn before me this }
 — day of —, 1840. }

RANSOM COOK, *Justice of the Peace.*

THE LIKE, WHEN THE AFFIDAVIT IS MADE BEFORE THE RETURN DAY OF
 THE PROCESS.

Entitle the cause and proceed with a statement of facts, &c. substantially, as in the foregoing form, and then add the following or some other satisfactory excuse :

And this deponent further says, that he is now sick, confined to his room, and unable to appear before the said justice ; or, that his wife is dangerously ill, and he considers it unsafe to leave her in order to attend

before the said justice at the hour appointed for the return of the process in this cause; or, that his business is of such a nature as to require his personal attendance at Albany on the day appointed for the return of the process in this cause.

RICHARD ROE.

Sworn before me this }
 — day of —, 1840. }

WM. A. BRACH, *Com'r of Deeds.*

Upon the affidavit's being made and presented to the justice, he should immediately proceed to determine whether he will or will not enter a judgment of discontinuance. He should in no case do so, unless satisfied *from a consideration of the facts detailed in the affidavit*, that he is a material witness, &c. It is clearly wrong for the justice to act upon his own knowledge or recollection of facts—he is confined to the evidence before him; and while it would be improper, on the one hand, to render judgment of discontinuance upon an insufficient and unsatisfactory affidavit, it would be equally improper, on the other, to refuse to do so, merely because the justice cannot recollect the facts which the defendant swears he expects to be able to prove by him. The language of the statute is, “*if the justice shall be satisfied,*” &c. that is, satisfied, from the affidavit produced, that the facts which the defendant swears he expects to prove by him are pertinent and material to the issue, and that they can be satisfactorily proved by no other person; such being the case, he should render judgment of discontinuance. The case of *Hopkins v. Cabrey*, recently decided by our supreme court,^(a) fully sustains the above remarks. That case was as follows: Hopkins sued Cabrey before a justice, for money had and received to the plaintiff's use, viz. the surplus money remaining in the defendant's hands as school district collector, after selling the plaintiff's property for a school tax, and retaining sufficient to satisfy said tax. After the plaintiff had declared, and before plea, and in order to make a case for judgment of discontinuance, the defendant made an affidavit that the justice was a material witness for his defence. This being held insufficient, the defendant then made a further affidavit, setting forth the testimony which he expected to prove by the justice, as follows: “The particular facts which the said defendant expects to prove by the said justice are, that previous to and before the commencement of this suit, the said plaintiff sued the said defendant before the said justice, for the same identical property for which he now

(a) This case is not yet reported. It was decided July term, 1840.

claims the surplus money, and judgment was passed on the same and entered in favor of this defendant against the said plaintiff for costs. And also, this said defendant expects to prove by the said justice, that said plaintiff acknowledged in the presence of the said justice that the defendant had tendered to him, said plaintiff, the overplus money, before the commencement of the former suit; and that he had no claim for overplus moneys. And this defendant does not know of any other person by whom he can prove the declaration last named in this affidavit." Upon this affidavit the justice ruled as follows: "I am not satisfied that I am or can be a material witness in behalf of the defendant in this cause, for I know nothing material between the said parties, except what is contained in the record of the former trial between these parties before me, which this defendant can at all times avail himself of upon the trial of this cause; and further, I have no recollection of ever having heard the plaintiff admit that the defendant had tendered him the overplus money, as mentioned in the affidavit." The defendant then pleading, and the justice rendering judgment for Hopkins the plaintiff, the judgment was reversed by the common pleas upon certiorari, on the ground that the justice ought to have rendered judgment of discontinuance; and Hopkins brought error to the supreme court.

COWEN, J. "The affidavit was clearly sufficient within the statute. Sess. Laws of 1838, ch. 243, § 1, p. 232. It may not have been so in respect to the former suit; but was as to the tender and admission. It is no answer to say that a tender was not pleaded. The omission may have been for the very reason that the testimony of the magistrate was gone. Again, *the justice had no right to interpose his private knowledge or recollection*, as an answer to the affidavit. Such a power would enable a justice to defeat the application, and at the same time to put the point beyond the reach of review, even on the facts which he may assume to know, or to have forgotten. Here, it is true, he states them; but not under his oath as a witness—that the defendant has a right to require. Again, his specification was not satisfactory. He had no right to assume that the docket and other written proceedings would have been proof as full to the purpose as if accompanied with his oath. Oral proof is often necessary to show what was in fact heard and submitted under an issue which has been tried, in order to give it the desired effect upon a subsequent trial of the same matter. His want of recollection might also have been remedied by a recurrence to circumstances in the course of his examination as a witness. I think the judgment of the common pleas should be affirmed."

Where the suit is commenced by warrant, (which case, as we have seen, is not included within the provisions of the statute quoted, ante, 662,) if it be made to appear to the justice issuing the process, by the affidavit of the defendant, that such justice is a material witness in the cause, instead of the justice's entering a judgment of discontinuance, the constable is required to take the defendant before the next justice of the city or town, who shall take cognizance of the cause, and proceed thereon, as if the warrant had been issued by him. 2 R. S. 161, § 21. Vid. also ante, 505, and note (1).

SECTION XII.

OF PLEAS.

After the plaintiff has put in his declaration, and no affidavit that the justice is a material witness having been made, the next step is the exhibition of the plea or defence set up on the part of the defendant. Pleas are of two kinds: First, *dilatory pleas*, which are usually called *pleas in abatement*; secondly, *pleas to the action*. 3 Blac. Com. 301, 2. The latter are termed *pleas in bar*. The distinction between them is this: Whenever the matter pleaded merely defeats the present proceeding, by questioning its form, or other thing in relation thereto, which, though available, would leave the plaintiff free to commence another action for the same cause, this should be pleaded in *abatement*; but a plea which shows that the plaintiff cannot, at any time, maintain his action, is a *plea in bar*. Thus, a plea that there are others who ought to be joined with the defendant, in an action on contract; or that the defendant has before brought an action in a justice's court against the plaintiff, in which the latter is bound to set off the demand for which he sues, is a *plea in abatement*; because it only questions the form of the plaintiff's proceeding in the first instance, or shows that his action is premature in the last, and though the plea be true, yet he may commence his action anew. But a plea, denying the plaintiff's declaration; or a plea of release, showing that the plaintiff never can sustain his action, is a *plea in bar*. Vid. 4 T. R. 227. Bac. Abr. Abatement, (N.) Com. Dig. Abatement, (B.)

I. OF PLEAS IN ABATEMENT.

These may be—*First*, **TO THE JURISDICTION OF THE COURT.** This plea is seldom or never used in practice, and I am not aware of any case in which it is necessary to be pleaded, as objections to the jurisdiction may generally be taken at any stage of the cause where the want of jurisdiction appears. However, if the defendant choose to do so, a plea of this nature may be interposed. Objections to the jurisdiction may be taken, where there is a total want of jurisdiction, so that the proceedings before the justice are wholly void. Where the justice is an inn-holder or tavern keeper, in fact, having become so since his election; where the defendant is sued as an executor or administrator; or where the suit is for a cause of action expressly excluded from a justice's jurisdiction, as assault and battery, slander, &c.; and so of all the other excepted cases mentioned in 2 R. S. 158, § 4. Objections to the jurisdiction may be taken in a great variety of instances, all of which it would be impossible here to enumerate. Where an attachment or warrant is issued upon insufficient proof, or without proof; or where the justice is a party to the cause, or interested in it; or related to either of the parties, so that he would be excluded from being a juror; in these and the like cases, it would be proper to interpose an objection to the jurisdiction of the court, and such an objection would be as available as though formally pleaded in abatement. Vid. Edw. Treat. 3d ed. p. 50, and the cases there cited. Grah. Prac. 2d ed. p. 224, 5.

Secondly, **TO THE DISABILITY OF THE PERSON OF THE PLAINTIFF**, showing that he is incapable of commencing or continuing his suit; as that he is a fictitious person, 19 John. 308, or dead, Archb. Pl. 304, or died pending the suit. But this last cause will not abate the suit, if there be more than one plaintiff, and the cause of action survive, as we have seen, ante, 553, 557, is generally the case; and so of the defendants, if it survive against one or more of them, as we have also seen, ante, 555, is generally the case in an action on contract. The provision, that actions shall not abate on account of death, where the cause of action thus survives, is by statute. 2 R. S. 307, § 1. So the defendant may plead in abatement that the plaintiff is an alien enemy; and, indeed, this may be pleaded in bar. 10 John. 183. It must also appear that the plaintiff is resident abroad. id. 70. 2 Gallison, 105, and vid. also 10 John. 69. 8 T. R. 167. 2 Esp. R. 583. Judgment in favor of the defendant, on a plea of alien enemy, will not be a bar to the action on the return of peace, though the plea be in bar. 10 John. 183. 6 Taunt. 237. 11

John. 418. It is no defence that the plaintiff sues as trustee for an alien enemy, & Taunt. 332, and vid. 6 T. R. 23; especially, if the war be at an end. 2 John. Ch. R. 508. So the defendant may plead in abatement that the plaintiff is an infant, and has declared by himself or attorney, vid. ante, 542 to 545; and the objection that the plaintiff is an infant, not suing by *prochein ami*, can only be pleaded in abatement, 2 Saund. 212, *a*, n. 5, and is not a proper ground of nonsuit at the trial; for by pleading in chief, the defendant admits the due appearance of the plaintiff. 7 John. 373. The defendant may also plead in abatement that the plaintiff is a married woman, or married since the commencement of the suit; and this is the only way in which the objection can be taken advantage of, where she would, if joined with her husband, be a proper party to the suit. 3 T. R. 631. 4 id. 627. 1 Bac. Abr. 503.

Thirdly. TO THE PROCESS AND DECLARATION. The defendant may plead, that the plaintiff has not brought his action before a justice in the town wherein he (or if there be more than one plaintiff, wherein either of them) resides, or where the defendants, or any one of them, resides, or before a justice of another town in the same county, next adjoining the residence of the plaintiff or defendant. This plea would not, however, be available, if the defendant had absconded from his residence; for, in such case, the action should be brought before a justice of the town in which the defendant or his property might be; and if the plaintiffs be all non-residents of the county, or if the defendant be a non-resident of the county, then the action should be brought before a justice of the town, in which the plaintiffs or defendant might be. 2 R. S. 159, § 8.

Other matters in abatement, which relate to the process and declaration, viz. non-joinder and mis-joinder of plaintiffs and defendants, I have already considered, in speaking of the proper parties to the action, and shall not here repeat them. Vid. ante, 552 to 554, 557, 8, *as to non-joinder of proper plaintiffs*. And ante, 554 to 556, 558 to 560, *as to non-joinder of proper defendants*. Vid. also 7 Cowen, 316. 9 id. 44. 2 Wen. 327. To a plea of the non-joinder of a party as defendant, the plaintiff may reply that the party not joined was an infant. 3 Esp. R. 76. 4 Taunt. 468. And, where the action is substantially founded upon contract, or arises from matter of contract, although in form the action be for a wrong or in tort, the defendant may plead the non-joinder of other parties, in the same manner as if the action had been brought directly upon the contract. Thus, in an action on the case against a carrier, upon the custom, or the owner of a ship, for the non-delivery of goods which

he had undertaken to carry, as the plaintiff has an election to bring assumpsit, it seems that he cannot, by adopting another form of action, vary the rights of the defendant, who may therefore plead in abatement that his partners ought to be joined with him in the suit. 6 T. R. 369. 5 id. 651. 5 Bas. & Pull. 465. But vid. ante, 565, 6.

Where the plaintiff sues in a particular character, as executor, overseer of the poor, supervisor, assignee, &c. &c. if the defendant means to contest the character in which the plaintiff sues, he must plead specially that the plaintiff is not overseer, &c. If he pleads the general issue, he admits the character assumed by the plaintiff to be correct, 15 John. 208, 9; 2 Maule & Selw. 553; that this would be proper in abatement, vid. Com. Dig. Abatement, (E) 6, where it is said that if suit be brought as by, or against husband and wife, who are not married, this is proper matter in abatement.

Fourthly. TO THE PERSON OF THE DEFENDANT. That the defendant is a married woman, at, or after the commencement of the suit, is a proper plea in abatement. But where the husband is civilly dead, as if he be confined to the state prison for life, 2 R. S. 586, § 20, or is an alien enemy, residing abroad, either of these facts may be replied, and will oust the defendant of her plea in abatement. Vid. 1 Chit. Pl. 388, 9, and the cases there cited.

OTHER PLEAS TO THE PROCESS, &c. It is also matter in abatement to the process, &c. that it is by summons against a defendant, who is a non-resident of the county where the action is brought; or by process other than short summons or short attachment, in cases where the latter kind of process only is proper. Vid. ante, 452, 453, 461. So where it is by warrant, and the defendant is a resident freeholder, or man of a family, and the necessary proof was not made to entitle the plaintiff to his warrant; or, if the plaintiff is a non-resident, and the proper security was not given. Ante, 462. So where the process was by attachment, issued without the proper proof, or the proper security; but not where it issued upon proper proof, though false, or founded in mistake. Ante, 487. 9 John. 130. Other pleas to the process, &c. are, certain cases of privilege from arrest upon a warrant, or of privilege from the service of other process mentioned, ante, 505, as to privilege from service by summons, &c. 508 to 515, of a warrant, &c.; which we shall by and by notice more particularly.

As to any defect appearing upon the face of the process or return, the proper mode in which to avail yourself of this advantage is, to state your

objection verbally to the justice and move to set aside the proceedings. And a variance between the process and declaration cannot be pleaded in abatement. 12 Wen. 271.

As to the cause of abatement, by non-joinder of the proper defendants, *vid. ante*, 555, 560.

We have also seen that a plea in abatement, for the cause that the plaintiffs or defendants suing or being sued as husband or wife, are not married, is proper. *Com. Dig. Abatement, E. 6.*

When a misnomer may be pleaded, and the effect of a misnomer, *vid. ante*, 583, 4, 5. A defendant cannot plead a misnomer of his co-defendant in abatement. *Lutw. 36.* The misnomer of a defendant must, in all cases, be pleaded in abatement. 4 Cowen, 148. *Vid. also*, 4 Cowen, 157. A mistake in the declaration as to the christian name of a *plaintiff*, is not a ground of nonsuit at the trial; and such mistake cannot be taken advantage of, except by a plea in abatement. 2 Hall's N. Y. *Super. Ct. R.* 569.

Fifthly. PLEAS TO THE ACTION OF THE PROCESS. A fifth ground for pleading in abatement is, that another action is pending for the same cause, either in a court of record or a justice's court, or, which has the same effect, that the defendant first commenced an action against the plaintiff, in which the plaintiff is compellable to set off the demand disclosed in his declaration. 1 John. 283. 1 Cowen, 115. And it makes no difference whether such prior suit by the defendant, was by summons or warrant. 10 John. 238. But such prior warrant must be *served*, or, in other words, an *actual arrest* of the defendant must be made, before it shall be deemed the commencement of a suit. 2 R. S. 160, § 12. *Vid. also ante*, 451. Under certain circumstances, even where such prior suit is duly commenced, a warrant may issue at the suit of the defendant, as we shall notice more at large by and by. *Vid.* 2 R. S. 165, § 49. But a suit subsequently commenced can never be pleaded in abatement. 1 Wheat. R. 215.

This pendency of another suit can only be pleaded in abatement, 3 John. 259, *Com. Dig. Abatement, H. 24*, except in a penal action, wherein the pendency of a suit by another person, for the same penalty, may be pleaded in bar. 1 Chit. Pl. 393. It only applies where the other suit is in the same court, or in another court, deriving its jurisdiction from the same government or authority. 9 John. 221. A plea, therefore, of an action pending in a foreign country, or in another state, is bad. 12 John. 100. 9 *id.* 221. And it has been held, that where the other action was brought in the circuit court of the United States in another state, the

pendency of the proceedings in that court cannot be pleaded in abatement of an action in this. 12 John. 99. But where a debt due to the plaintiff, had been attached in the hands of the garnishee, under a foreign attachment in the state of Maryland, by a creditor of the plaintiffs, it was held, that in an action brought by the plaintiffs, against their debtor, the garnishee, in this state, he might plead in abatement the pendency of the foreign attachment in Maryland. 5 John. 101. And vide, 8 Cowen, 311. Salk. 280, pl. 6. And it seems that the pendency of a suit against a vessel, for a forfeiture, in the district court, may be pleaded in abatement of an action of trespass for making the seizure. 3 Wheat. R. 247. In a suit against two, founded upon a joint cause of action against both, one of the defendants cannot defeat the action, by pleading in abatement, matters which are applicable to himself alone. To make a plea in abatement effectual in such a case, all the defendants must unite in the plea, and it cannot be interposed by one alone. 1 Hall's N. Y. Super. Ct. R. 137. The pendency of two suits cannot be pleaded in abatement of each other, unless commenced at the same time. 3 Wen. 258. A writ of error pending, may be pleaded in abatement to a suit on the judgment; but the plea must state, that the writ of error was brought before the action was commenced on the judgment, and must show all those steps taken, which are required by law to make it a *supersedeas* of execution. 2 John. Cas. 312. *And when a writ of error shall operate as a supersedeas*, vid. 2 R. S. 494, 5. Upon the same principle, where a certiorari or appeal is brought on a justice's judgment, its pendency may be pleaded in abatement, to an action upon the judgment, but it must appear, that such certiorari or appeal was brought before the suit was commenced.

Where the defendant pleads another action pending, the plaintiff may, before replication to the plea in abatement, discontinue the first suit, and that without leave of the court or payment of costs. 1 John. Cas. 397, S. C. Coleman, 97; but vid. 1 Chit. Pl. 394; vid. also 5 Mass. R. 174; by which means he will be enabled to reply, *no such record*, or *no such suit depending*, as the defendant has set forth in his plea, and thus deprive him of the benefit of it.

Of the form of a Plea in Abatement.

As this plea professes to question the form or regularity of the plaintiff's proceedings, and goes merely in delay of his remedy, the law exacts the greatest formality and accuracy in framing it. A plea in abatement must not be double; it must be good to every intent, and requires the greatest precision and certainty. 2 Saund. 209, b. 2 John. Cas.

312. Co. Litt. 303, a. 3 T. R. 166. Willes, 42. 3 Wils. 413. 6 Bingh. 416. It must show wherein the plaintiff can have a better precept or remedy, or, in the language of the common law courts, must give him better process. 6 Taunt. 595. 4 T. R. 224. This is a cardinal principle: Thus, if, in an action of assumpsit against A, he plead in abatement the non-joinder of B, as a joint contractor, and the plaintiff take issue upon the plea, and it appear in evidence on the trial, that the contract was made by A, B, and C, judgment must be rendered in favour of the plaintiff; for the defendant has not, by his plea, given the plaintiff a better writ. *M'Intire v. Simmons*, Cor. Spencer, J., N. York sittings, November, 1815. So, if the defendant plead that he is misnamed, or that a wrong addition is given him in the writ; he must show in his plea, what his true name or addition is; and thus enable the plaintiff to avoid a similar mistake in a subsequent suit. Vid. Gould's Pl. ch. 5, § 67.

This plea should also have proper and apt beginning and conclusion, 2 Saund. 210, n. 1; and it is laid down as a general rule, 6 Taunt. 587, 2 Marsh. 299, S. C., that a plea in abatement is to be known by its beginning and conclusion whatever *matter* it may contain. 2 John. Cas. 313. 10 John. 49. Vid. Grah. Prac. 2d ed. 228. Gould's Pl. ch. 5, § 145. 2 Saund. 209, d. 1 Bac. Ab. 28. Thus, a plea commencing and concluding in *abatement*, although it contain matter in *bar*, is to be regarded as a plea in *abatement*, 6 Taunt. 587; 1 Bac. Ab. 27; Gould's Pl. ch. 5, § 147; and on the other hand, if the matter pleaded goes only in abatement, (as *misnomer*, or any informality in the *process*,) but begins and concludes in *bar*, the plea is in *bar*. Id. But when the beginning and conclusion of the plea differ, (the former being in *abatement*, and the latter in *bar*, and *e converso*,) there is some confusion in the books, as to the effect of the discrepancy upon the *character* of the plea, and consequently upon the mode of answering it, and the kind of judgment to be rendered upon it. On this subject, the late Judge Gould, in his excellent treatise on pleading, draws the following distinctions which are unquestionably correct according to the weight of authority. When the beginning and conclusion of the plea differ, the *subject matter* would seem to be the most simple and obvious criterion of its character. And such is the established rule, when the application of this criterion would favor the *plaintiff*; though it is otherwise, when the same criterion would operate in favor of the defendant: a distinction, derived from the policy of discouraging *dilatory* pleas. Thus, if matter, which goes only in *bar*, begins in abatement and concludes in *bar*, or *e converso*; it is a plea in *bar* by reason of its *subject matter*; and being ill, by reason of the dis-

crepancy between its commencement and conclusion, the plaintiff, by demurring as *in bar*, that is, by concluding his demurrer with a prayer of his *debt* or *damages*, is entitled to *final* judgment upon it. So also, if matter which goes only in abatement, begins in bar and concludes in abatement, or *e converso*, the plaintiff may demur as *in bar*. And if he thus demurs, he entitles himself to *final* judgment. But if issue is joined on such a plea, and found for the *defendant*, the judgment will be, as on a plea in *abatement*; though if the same issue were found for the *plaintiff*, he would be entitled to judgment *in chief*. If a plea of matter, which goes indifferently, either in bar or in abatement, differs in its commencement and conclusion, the plaintiff may with equal propriety, demur to it, either as in bar or in abatement. For the beginning and conclusion neutralize each other, as regards the character of the plea; and its *subject matter*, (as it may operate either way,) furnishes no criterion. The judgment will therefore follow the nature of the prayer with which the demurrer concludes. It is obvious then, that the course most advantageous to the plaintiff, is to demur to the plea, as *in bar*; as by thus demurring, he will entitle himself to judgment of recovery. For the above remarks, *vid.* Gould's Pl. ch. 5, § 149 to 152.

To illustrate the above rules, giving a character to this plea, suppose a plea to commence thus: "*the defendant prays judgment whether he ought to answer the plaintiff, because he says,*" &c.; and then going on, and setting forth a *release*, which is matter in *bar*, should conclude, "*wherefore he prays judgment, whether he ought to answer the said plaintiff.*" Here the plea begins and concludes as a plea in *abatement*, which relates to the person of the plaintiff or defendant, and for this reason, although it contains matter in *bar*, *viz.* a *release*, yet it shall be esteemed a plea in *abatement*, and upon a demurrer thereto, a judgment for the plaintiff upon such demurrer would be, that the defendant *answer over* to the plaintiff's declaration, and not, as upon a plea in *bar*, that the plaintiff *do recover* his claim against the defendant; and it is principally in reference to the *judgment*, which we shall hereafter consider, that the above distinctions are considered important. This distinction, however, I have no doubt, must be confined to courts of record. If the matter be in bar, whatever the beginning or conclusion, in a *justice's court*, the plea must be esteemed in bar; and any defect in the beginning or conclusion, which is mere matter of form, must be taken advantage of by special demurrer. *Vid.* 2 John. Cas. 313. 3 T. R. 186. In these last cases, it was said that a formal defect must be objected to by special demurrer, even in a plea in abatement. But *vid.* Gould's Pl. ch. 9, § 12, where it is said that in *dilatory* pleas, defects in *form* are reached by *general* demurrer.

The commencement of a plea in bar is, "that the plaintiff ought not to have and maintain his aforesaid action thereof against the defendant," *vid. ante*, 570, as we shall see more at large hereafter.

By this brief illustration, the nature, meaning and object of the above rules, determining the character of a plea in abatement, will be understood. They are, to be sure, of no great importance in a justice's court, from the liberality with which a party ought to be allowed to amend his plea in bar, if it be really so, even on a judgment against him upon demurrer, which, in effect, allows of an answer over the same as a judgment, upon demurrer, against a plea in abatement; but it is held that a plea in abatement cannot be amended, 5 *Wen.* 72, and it is the better opinion, perhaps, that the plaintiff need never demur specially to such pleas, but a general demurrer will reach every defect. *Vid.* Gould's *Pl. ch.* 9, § 12, and the cases there cited in note (*s*). Hence the above distinctions may possibly be of occasional use to the justice, as an auxiliary guide to his conduct on the subject of these pleas; as whether a particular plea is a subject of amendment, or its defects reached by a general demurrer, where they are merely defects of form. And again, a plea in abatement cannot be pleaded after a plea in bar, neither can a plea in bar, and a plea in abatement, be pleaded at the same time, 2 *Cowen*, 417; 13 *Wen.* 285; and if the defendant plead in abatement and in bar at the same time in two several pleas, the plea in bar being first, the justice may treat the plea in abatement as a nullity, and it need not be answered. 1 *John. Cas.* 101. Here, again, the above formal rules may be of use; and so, perhaps, in some other cases. Where a plea has no formal commencement or conclusion, its character must be determined by its matter only. 2 *John. Cas.* 313. A plea of a misnomer, it is said, must be pleaded in proper person. 2 *Saund.* 209, b. There are, however, precedents to the contrary; *vid.* 2 *Saund.* 209, b. 1 *Chit. Pl.* 398; and in *Ld. Raym.* 509, *Holt, Ch. J.* was of opinion, that a misnomer pleaded by attorney, was good cause to refuse the plea, but not to demur. A plea to the jurisdiction of the court must also be pleaded in person, and not by attorney. 2 *Saund.* 209, c. 1 *Chit. Pl.* 398. 2 *W. Blac.* 1094. So if a single woman contract a debt, and afterwards marry, and is sued as a single woman, she must plead her being a married woman in abatement, in person, and not by attorney. 2 *Saund.* 209, c. 1 *Chit. Pl.* 399. But, with these exceptions, pleas in abatement may be pleaded by attorney. 1 *Chit. Pl.* 398. *Vid.* also *Grah. Prac.* 2d ed. 229. Where the defendant is bound to appear in a particular manner, as in case of infants, married women, sued as such, idiots and lunatics, &c. their pleas, of whatever nature, must, of course,

be pleaded and conducted by the person legally authorized to answer for them, as in the cases mentioned, ante, 533 to 536, and vid. also, 1 Chit. Pl. 399. 2 id. 410.

Beginning and conclusion of a Plea in Abatement.

1. In pleading to the jurisdiction of the court, the plea begins and concludes, by praying judgment, *if the court will take further cognizance of the suit.* 1 Bac. Abr. 28. 2 Saund. 209, d.

2. Where the defendant pleads in abatement of the process, a matter apparent on the face of it, (as that there are not six days between the test and return of a summons, for instance,) he must begin and conclude his plea *by praying judgment of the process, and that the same may be quashed.* 2 Saund 209, a. d. and vid. *further as to the payer of judgment,* id. But we before mentioned, that the better way to take advantage of the defect appearing in the process or return is, to move to set the same aside. Ante, 670.

Where the plea in abatement of the process is founded on some extrinsic matter, such as a misnomer, &c. not appearing on the face of the process, it may commence and conclude in the same way, though the practice is said in strictness to be, merely *to conclude* with praying judgment of the process, &c. 2 Saund. 209, a. d. A plea of misnomer of the defendant is bad, which begins thus: "And the said *Richard*, sued by the name of *Robert*," &c. 5 T. R. 487, or thus: "And *he* against whom the plaintiff has brought his suit, by the name of *Richard Roe*," &c. 8 T. R. 515. 5 Taunt. 652, 653, a.

3. In pleading to the person, either of the plaintiff or defendant, the prayer is of *judgment whether the defendant ought to answer, or the plaintiff to be answered*, accordingly as the plea relates to the person of the plaintiff or defendant. Vid. 2 Saund. 209, d.; 5 Mod. 144, and vid. further, 2 Saund. 210, c.; 1 Bac. Abr. 28.

Yet it is said, that a plea of privilege of an attorney (which is a plea to the person) concluding with a prayer, as in a plea to the jurisdiction whether the court will take further cognizance of the suit, is not a nullity, 1 John. Cas. 328, and, indeed, such a plea has been adjudged good upon demurrer, 12 East, 544, and this seems a very appropriate mode of praying judgment in a justice's court, upon a plea in abatement, by an attorney of the higher courts, when arrested on process issued from a justice's court; for they are expressly privileged from arrest while their respective courts are sitting, in case they are actually employed, in some cause pending and then to be heard, or when attending on a reference, and for a reasonable time after the hearing. Vid. ante, 509.

If the death of the party be pleaded in abatement, the defendant must not pray *judgment of the process and that the same may be quashed*, but if the court will proceed any further; for the writ was in fact abated before, by the death of the party. 3 Lev. 120.

A plea in abatement must pray the proper judgment, or the court is not bound to give it, as they are upon a plea in bar, 10 East, 87, and unless the proper judgment be prayed, it will be bad on demurrer. 3 T. R. 185.

Pleas in abatement are not amendable, because they are dilatory, and do not go to the merits of the action. 1 Selw. Pr. 275. 5 Wen. 72. But yet it would be advisable, where matter in bar is pleaded in abatement, to suffer the party to amend such plea if overruled upon demurrer, and, indeed, such would be the effect of the judgment itself; for the party, in such case, is always bound to answer further.

The plaintiff, moreover, need not point out the particular defect of the plea in abatement, though it be merely formal, as he must do upon demurrer, in other cases; but a general demurrer reaches every defect. 2 Maule & Sel. 485. Ld. Raym. 1015. Vid. also Gould's Pl. ch. 9, § 12, and the cases there cited in note (s).

When one plea in abatement is overruled, the defendant may plead another, provided he does not invert the established order of pleading, which is, 1. *To the jurisdiction of the court*; 2. *To the person of the plaintiff*; 3. *To the person of the defendant*; 4. *To the process*. Vid. Dunlap's Prac. 428, 445. Grah. Prac. 2d ed. 224. But the latter plea must not be repugnant to the former. Dunl. Prac. 445. Com. Dig. Abatement, i. 4. A plea in the second, third, or fourth order of pleading, waives all right to plead any matter whatever in abatement. 1 John Cas. 101.

These pleas in abatement must be verified by affidavit, or by some other evidence. 2 R. S. 276, § 21. But if the matter of the plea appear upon the face of the process or proceedings before the justice, no affidavit of verification is necessary. Vid. Grah. Prac. 2d ed. 229. The affidavit may be made by the defendant or a third person. Id. And the plea may be verified by proof other than by affidavit—this is authorized by the very terms of the statute. The affidavit may be in the following form, and should be inserted immediately after the plea :

FORM OF AN AFFIDAVIT OF VERIFICATION TO A PLEA IN ABATEMENT.

SARATOGA COUNTY, ss. JAMES JACKSON, the above named defendant, being duly sworn, says that the above plea is true in substance and matter of fact, to his best knowledge and belief.

JAMES JACKSON.

Sworn before me this }
 — day of —, 1840. }

RANSOM COOK, *Justice of the Peace.*

FORMS OF PLEAS IN ABATEMENT.

For the reasons stated ante, 668, we give no forms of pleas to the jurisdiction of the court. They are seldom or never heard of in a justice's court.

TO THE PROCESS AND DECLARATION.—*Non-joinder of a tenant in common, in trespass for taking, or injuring goods or chattels.*

Richard Roe }
 ads. }
 James Jackson. }

The said D. prays judgment of the summons in this cause, and that the same may be quashed, because he says, that the said several goods and chattels mentioned in the said declaration, at the time of the said supposed trespass, if any such there were, were the proper goods and chattels of the said P. and one *John Styles*, and not of the said P. alone; and that the said P. and the said *John Styles* then possessed the same goods and chattels, as tenants in common; which said *John Styles* is still living, to wit, at the town of *Saratoga Springs*, in the county aforesaid. And this he, the said D., is ready to verify, &c. Wherefore he prays judgment of the said summons, and that the same may be quashed.

The same form will answer in *trover*, or *trespass on the case*, for taking or injuring personal property, only substitute the word "*grievance*," or "*grievances*," for "*trespass*," or "*trespasses*."

When the plea in abatement of non-joinder, is to the whole of the action, it is not necessary to plead in abatement both of the process and declaration, though this may be done; but it is sufficient to plead to the process only; but where it is intended to plead in abatement of only part of the process, (which may be done,) as if the cause of abatement arise from *some* of the counts in the declaration, or, in the last form, from *some* of the goods being jointly owned by the plaintiff and another, the

defendant must plead in abatement of both. 2 Saund. 210, n. c. and the precedent, 2 Bos. & Pull. 420.

And an action may be thus abated as to part, and remain good as to the residue ; and the defendant may plead in abatement as to part, and demur, or plead in bar to the residue of the process and declaration. The settled rule on this subject is, that where the plaintiff in any action which is cognizable before a justice, demands two things, and it appears from his own showing that he cannot have an action or better process for one of them, the process shall not abate in the whole, but shall stand for so much as is good ; but if it appear that he has a cause of action for both the things demanded, but the process is not the proper process for one of them, but he may have another action for it, in another form or right, the whole process shall abate. Thus, if executors should bring an action *for breaking the testator's close*, and taking away a certain sum of money, in the testator's life time, though the writ will not lie for breaking the close, *vid. ante*, 557, 8, yet it is good for taking away the money. *Id.* And again, where the plaintiff brought an action of *assumpsit* as administrator, and declared in several counts on four several promises, of which three were laid to the intestate, and the fourth was on an *account stated*, or balance struck, between the plaintiff and defendant, of matters in the plaintiff's own right ; on demurrer, the court abated the whole action, because the plaintiff could not join a count for moneys due to his testator with a count for money due in his own right. *Vid. the cases cited in Dunlap's Prac.* 437, 8. *Vid. also Gould's Pl. ch. 5, § 157.* But in these cases, where the cause for abating the whole writ grows out of the form of the plaintiff's declaring, whether the question arise upon demurrer, or plea in abatement, the justice may, I think, suffer the plaintiff to amend, as in a misjoinder of action. *Vid. ante*, 563, 4. And where the cause of abatement does not appear upon the declaration, but is pleaded by the defendant, and relates to but part of the process and declaration, then, in all cases, a part may abate and the residue stand good. 2 Bos. & Pull. 422, 3.

If a plea in abatement contain matter which goes in part abatement of the process only, but conclude with a prayer that the whole process may be abated, the court may still abate so much only as the matter pleaded applies to. 2 Saund. 210, d. 2 Bos. & Pull. 422.

In trespass to personal property.—*Non-joinder of a joint tenant by the plaintiff, as to part of the goods ; and general issue, as to the residue.*

And the said D., as to the taking and carrying away and converting to his own use, the said bed, two blankets, and two pillow cases, in the said

declaration mentioned, prays judgment of the summons and declaration in this cause, because he says that the said bed, two blankets and two pillow cases, at the time of the said supposed trespass, if any such there were, were the proper goods and chattels of the said P., and one *John Styles*, and not of the said P. alone; and that the said P. and the said *John Styles* then possessed the said goods and chattels as joint tenants; which said *John Styles* is still living, to wit, at, &c. and this he, the said D., is ready to verify, &c. Wherefore, as to the taking and carrying away, and converting to his own use, the said bed, &c. he prays judgment of the said summons and declaration, and that the same may be quashed. And as to the taking and carrying away, and converting to his own use, the residue of the goods and chattels in the said declaration mentioned, he the said D. says he is not guilty thereof, in manner and form as the said P. hath alleged.

If there be several counts, setting forth the taking, &c. of the same goods and chattels, or other goods and chattels, the allegations in each count may be met in the same way, according to the fact, by pleading in abatement *as to the taking, &c.* in the first count, and the general issue, or other plea in bar, or abatement, as to the *taking, &c.* the residue of the goods in that count, and so in the same manner of the 2d count, designating them in the pleas, 1st, 2d, and 3d counts, &c. to any number.

These forms can easily be adapted to *trover, case, &c.* and other wrongs to personal property, unaccompanied with force, which are styled, in pleading, *grievances*, instead of *trespasses*.

Thus, in trover, say:

And the said D., as to the converting, &c. of the said bed, &c. as mentioned in the said declaration, prays judgment of the said summons, &c. because he says, that at the time of the committing of the said supposed grievance, if any such there were, &c. [omitting, in trover and other actions, the allegation that they *possessed* them as tenants in common, &c. at the time of the grievance, where the action presupposes the goods, &c. out of their possession, when the injury is committed.]

And the general issue, or other plea in bar, as to the converting, &c. of the residue of the said goods and chattels in the said declaration mentioned, may also be pleaded, according to the fact.

TRESPASS ON LANDS—Non-joinder of a tenant in common by the plaintiff.

The said D. prays judgment of the summons and declaration in this cause, and that the same may be quashed, because he says, that the said close was, at the time of the said several supposed trespasses, the close of the said P. and one *John Styles*, and not of the said P. alone. And that they then possessed the same as tenants in common. And the said D. avers that the said *John Styles* is still living, to wit, at, &c. and this, &c. Wherefore, &c. (*as in the last.*)

This plea is also proper in *actions on the case*, for an injury to real property, as for a nuisance, or suffering fire to burn over the plaintiff's land, &c.

As to whether this plea is such a plea of title as will oust the justice of jurisdiction, the requirements of the statute in such cases being complied with, vid. our remarks *post*, on the subject of pleas of title in bar.

ASSUMPSIT—Non-joinder of a joint promissor.

Pray judgment of the summons or warrant, &c. and say :

Because he says, that the said several supposed promises, if any such were made, were made jointly with one *John Styles*, and not by the said D. only, and the said *John Styles* is still living, to wit, at, &c. and this, &c. Wherefore, &c. (*as before.*)

If there be several counts in the declaration, for several causes of action, some of which have no foundation in fact, limit your plea in abatement, according to the truth of the case, or you may endanger your whole defence. Thus, suppose a declaration *for work*, which was done for you and another, in one count, and another count for *money lent*, another for *money paid*, &c. which two last charges are false, you should plead thus :

Non-joinder of co-promissor in the first count, and general issue as to the two last counts.

The said D., as to the promise mentioned in the first count of the said declaration, prays judgment of the summons and declaration. (*or warrant and declaration according to the fact,*) and that the same may be quashed, because he says, that the said promise in the said first count mentioned, if any such were made, was made jointly with one *John Styles*, and not by the said D. only, which said *John Styles* is still living,

to wit, at, &c. and this he is ready to verify, &c. Wherefore, as to the said promise, mentioned in the first count, he prays judgment of the said summons, (*or warrant*) and declaration, and that the same may be quashed.

And as to the said two last counts of the said declaration, he says, that he did not undertake and promise in manner and form as is therein alleged.

Again, suppose the plaintiff declares against you, in one count, for *goods sold and delivered*, a *part* of which goods, you purchased *alone*, and a *part* were purchased by *you* and your *partner*: If you plead in bar, the plaintiff may go for the whole under this single count. You must therefore, in this and the like cases, plead in abatement as to part of the claim and in bar as to the residue, (if you have a bar.) Thus:

Non-joinder of co-promissor, as to part, and statute of limitations as to the residue of the same count.

The said D., as to certain goods, part and parcel of the said goods, wares and merchandize mentioned in the said declaration, viz. (here mention them, if you have a bill of particulars; if not, say) of the value of \$10, and the sale and delivery thereof, to the said D., and his promise to pay the said P. therefor, as alleged in the said declaration, prays judgment of the warrant and declaration in this cause, and that the same may be quashed, because he says, that the said promise to pay the said P. therefor, if any such were made, was made jointly with one *John Styles*, and not by the said D. only, which said *John Styles* is still living, to wit, at, &c. and this he is ready to verify, &c. Wherefore, as to the said promise before mentioned in this plea, he prays judgment of the said warrant and declaration, and that the same may be quashed. And, as to the residue of the said cause of action in the said declaration mentioned, the said D. says, that the said P. ought not to have or maintain his aforesaid action thereof against him, because he says that he did not undertake and promise, in manner and form as the said P. has above thereof alleged, at any time within six years next before the commencement of this suit; and this he is ready to verify; wherefore he prays judgment as to the said residue of the said cause of action, and that the said P. may be barred from having and maintaining his aforesaid action thereof against the said D.

In pleading non-joinder to debt on bond, or other sealed instrument, or in covenant thereon, the plea craves oyer of the deed, and sets it

forth, and then avers, that the party omitted, sealed and delivered the deed, and not the defendant only, and that the co-obligor, &c. is still living, &c. The formal parts are framed on a similar plan with the above pleas of non-joinder in other cases. Vid. 2 Chit. Pl. 901, and cases there cited.

The following is the form of craving oyer in all cases : (and that the party has a right to oyer, vid. ante, 596, 7.)

Form of craving oyer by defendant.

Richard Roe }
ads. } The said D. craves oyer of the said deed, in the said
James Jackson. } declaration mentioned.

If it is produced, the plea then goes on to say, "*and it is read to him, in these words, viz. (setting forth the deed verbatim, and then proceeding thus :) which being read and heard, the said D. says, &c. (pleading in abatement, or in bar, as suits the defendant's case.)*" And so, if the plaintiff wishes oyer of a deed pleaded on the part of the defendant, he is entitled to it on a similar demand, and may set it forth as a part of his replication, if he shall deem it necessary. As if the defendant should plead a release, or other sealed instrument in bar.

When non-joinder should be pleaded in abatement, vid. ante, 554, 5, 6, and 560.

Misnomer of defendant in the christian name.

Richard Roe, sued }
by the name of }
Dick Roe, } *Pray Judgment of the process and declaration as*
ads. } *before, &c.*
James Jackson. }

Because he says, that he was named and called by the name of *Richard Roe*, and by the said christian name of *Richard* hath always been called and known, without this, that the said D. ever was named, called or known, by the christain name of *Dick*, as the said P. has above in declaring supposed.

The above may easily be altered to meet a misnomer of the surname, and so of a misnomer of the plaintiff.

When this plea is proper, vid. ante, 583 to 586.

Partners must sue and be sued in their names at length, and not in the name of their firm. 1 Penning. R. 75. Id. 187. Ante, 457.

Whether misnomer should be pleaded in proper person, *vid. ante*, 675.

Two names, substantially varying in sound in their origin and common use, are esteemed in law different names. 2 Roll. Abr. 135. Palm. 71.

A defendant may always be sued by the name which he has signed in dealing with the plaintiff, though but in a single instance, 6 Taunt. 530; and such an act would prove the replication, that he is known by the name signed. *Id.*

The omission of *junior* to a name cannot be pleaded, except where there are father and son of the same name. Com. Dig. Abatement, F. 21.

A plea in abatement is valid, without mentioning any place, as I have done in several of the above pleas. And the omission is not even a defect of form. And, though it do mention a place, which is out of the county where the cause is to be tried, this may be rejected as surplusage, and of course will not render the plea vicious.

To a warrant.—That the defendant is a freeholder of the county, and no oath made.

The said D. prays judgment of the warrant in this cause, and that the same may be quashed, because he says, that at the time of suing out the same, he the said D. was and still is a freeholder, actually residing in the county of Saratoga, and that the said P. then did and still does reside in the same county; and that on applying for the said warrant, it was not made to appear to the satisfaction of the justice who issued the warrant in this cause, by the affidavit of the applicant or of any other person, either that the said D. was about to depart from the said county with intent not to return thereto, or that the said P. would be in danger of losing his debt or demand against the said D., for which this suit is brought, unless the process thereof against the said D. should be by warrant, and this he is ready to verify. Wherefore he the said D. prays judgment, and that the said warrant may be quashed.

If the defendant is a man of a family, but not a freeholder, say, "*was and still is an inhabitant of the said county, having a family,*" &c. omitting *freeholder*.

If the plaintiff be a non-resident of the county, but omitted the proper proof or security, the above plea may be in the same form, omitting the allegation that the plaintiff is a resident of the county, and adding to the words, "unless the process thereof against the said D. should be by warrant," these words: "nor did the said P., being a non-resident

of the said county, tender to the said justice, nor did he the said justice receive of the said D. security for any sum which might be adjudged against him the said P. in this cause." Or if no proof of the plaintiff's non-residence have been taken by the justice, instead of the last clause, add the following: "nor did the said D., upon whose application the said warrant was issued, or any other person, by affidavit, state that he was a non-resident of the said county, or any fact or circumstance, facts or circumstances, showing that he was a non-resident of the said county, or whereby the said justice might the better judge of the necessity and propriety of issuing the said warrant." Vid. 2 R. S. 161, § 19. Ante, 462.

The intendment of the law, (on an issue joined upon this plea,) would most probably be, that the warrant was regularly issued by the magistrate, until the contrary be shown by the defendant. So, that if he is not possessed of some evidence negating the fact of its regularity, his plea will be of no avail, unless the plaintiff admit its truth. Vid. 8 John. 325. 14 id. 184, per Spencer, J. The proper course would undoubtedly be, to call upon the justice for the papers and proceedings before him in the cause. If it appear that no affidavit was made, or no security given, or that the affidavit or security are insufficient; and the other necessary facts are proven by proper evidence, (of all which the justice is to judge,) the plea will be sustained.

In the case of *Shannon v. Comstock*, 21 Wen. 457, the supreme court held, that under the non-imprisonment act, (which authorized the issuing of a warrant against a defendant non-resident of the state⁽¹⁾), on its appearing that a party, who had been arrested on a warrant for the recovery of damages for the non-performance of a contract, was not subject to arrest, it was the duty of the justice to dismiss the proceedings, although they were originally instituted on proof that the defendant was a non-resident. The action in that case was against two defendants, and Cowen, J. in delivering the opinion of the court, remarks, "I am inclined to think that where two persons are arrested in a suit against both jointly upon a contract, and one is a resident of this state, and has been for more than a month, he must be discharged."

(1) Vid. ante, 460. That part of the non-imprisonment act has, since the preceding pages were put to press, been repealed, so that non-residents may now avail themselves of the privilege from arrest the same as citizens. Vid. *Sees. Laws of 1840*, p. 120.

Plea in abatement.—*That the suit is not commenced either in the town in which, or in the town adjoining to the town in which either party resides.* Vid. 2 R. S. 159, § 8, 9.

[*Prayer that the summons, or warrant, as the case is, may be quashed.*]

Because he says, that the said P., at the time of the commencement of this suit, resided and had a legal residence in the town of *Hadley*, in the said county; and the said D. at the same time resided and had a legal residence in the town of *Waterford*, in the said county, and had not absconded from his said residence; and that this suit was brought and commenced in the town of *Saratoga Springs*, and the summons (*or attachment, if the suit be by attachment,*) was made returnable in the said town of *Saratoga Springs*, which does not adjoin either the said town of *Hadley* or *Waterford*. And this, &c. wherefore, &c. [*as before.*]

This plea arises under 2 R. S. 159, § 8, 9, which provides, that every action cognizable before justices of the peace shall be brought before some justice of the town wherein either the plaintiffs, or any one of them, reside; or, where the defendants, or any one of them, reside; or, before some justice of another town in the same county, next adjoining the residence of the plaintiff or defendant. But if a defendant has absconded from his residence, such action may be brought before a justice of the town in which such defendant or his property may be.

Privilege, as an Attorney of the Supreme Court.

The said D. in his proper person says, that before and at the time of the commencement of this suit, the said D. was, and from thence hitherto has been, and still is, one of the attorneys of the supreme court of judicature of the people of the state of New-York. And that at the time of the arrest of the said D., by virtue of the warrant issued in this cause, the said supreme court was actually sitting, to wit, at the capitol in the city of Albany, and the said D. was then employed in a cause then to be heard in such court. Wherefore he prays judgment, if the court, now here, will or ought to take farther cognizance of the action aforesaid depending against him, &c.

This plea may be easily adapted to the case of solicitors, counsellors, judges and other officers of this and other courts. Of this plea in general, vid. ante, 509, 3 Chit. Pl. 895, n. (b), and vid. the form of conclusion in 12 East, 544; 1 John. Cas. 328. Vid. also 2 Wen. 586.

An attorney, sued with another who is not privileged, is not entitled to this plea; but is, in common with other officers of courts of record, liable

to arrest the same as other persons. 2 R. S. 218, § 87. Ante, 509. Vid. 13 John. 252.

For the last plea generally, vid. ante, 29.

Where a summons or attachment is irregularly or improperly served, and there is no time for correcting the error or supplying the defect by a proper service before the return day, or for any other reason this is not done, such defect may doubtless be pleaded in abatement, because if the service be imperfect, the process itself falls to the ground. Vid. the cases noticed ante, 503, 4. And so, indeed, if the return be defective, unless it can be amended, though the service may have been correct. As to the mode of serving and returning the summons, and the effect thereof, vid. ante, 501 to 505; of the service and return of the warrant, vid. ante, 505 to 515; of the service and return of the attachment, vid. ante, 515 to 523. Vid. also ante, 524, 5.

And so a warrant abates, where the defendant is absolutely privileged from arrest, as in case of ambassadors, married women, &c. Vid. ante, 508, 9, 10.

But when the privilege from arrest is merely local, or temporary, the usual course is to move the justice, that the defendant be discharged from the arrest; as in case of militia, parties, jurors, witnesses, &c. And so, where the arrest is on Sunday, or by breaking open doors, &c. Vid. ante, 508 to 515. After being thus discharged, he may, in due time, be arrested again on the same process; for its force is neither extinguished nor impaired by the discharge. The arrest was void; it is as no arrest: "void things are as no things." 22 Vin. 13, pl. 17. 15 John. 157, per Van Ness, J. And such arrest of a person privileged, being void, the officer is not entitled to his fees. 10 John. 93.

For the purpose of determining whether the facts alleged on this motion for a discharge be true or not, the affidavits of the parties may, without doubt, be received for or against the discharge, which is the course in courts of record; or the justice may examine the parties and others on the usual oath—"to make true answers, &c. to such, &c. touching the defendant's application for a discharge."

Plea in abatement.—That the plaintiff is a married woman.

Pray judgment of the process, and proceed thus:

Because he says, that the said P., before and at the time of the commencement of this suit, was under coverture of one A. B. her husband, which A. B. is still living; and this he is ready to verify: Wherefore, inasmuch as the said A. B. is not named in the said summons, [or warrant, &c.] he prays judgment of the same, and that the same may be quashed.

This is not matter in bar of the action ; but the coverture of a woman, whether plaintiff or defendant, must be pleaded in abatement. Vid. 3 T. R. 631. Com. Dig. Pleader, 2, A 1. And this is a general rule, extending to all cases, either of wrong or contract. Id. and vide 12 John. 218.

But where the wife sues, or is sued, without the husband, though it be not pleaded in abatement, yet the husband may bring a writ of certiorari for this cause, and reverse the judgment. 3 T. R. 631, 2.

On this subject, generally, vid. ante, 553 to 560.

Coverture of the defendant.

[Pray judgment as before.]

Because she says that, on the day of the commencement of this suit, she was covert of one C. F., then and yet her husband. And this, &c. Wherefore, because the said C. F. is not named in the said summons, &c. *[as before.]*

PLEAS IN ABATEMENT, TO THE ACTION OF THE PROCESS.

Another action pending in a justice's court.

[Pray judgment of process and declaration, as ante, 681.]

Because he says, that before the commencement of this suit, viz. on, &c. the said P. did commence a suit against the said D. by summons before J. H., Esq. one of the justices of the peace of the county of Saratoga, in a plea of trespass on the case, for the same identical cause of action above set forth in the declaration of the said P., and that the said suit before the said J. H. is still pending. And this, &c. Wherefore, &c. *[as ante, 680.]*

Another suit pending, must alway be pleaded in abatement, and not in bar. 3 John. 259.

Plea.—A previous suit brought by the defendant, in which the plaintiff is obliged to set off his demand.

[Pray judgment of the process and declaration, as ante, 681.]

Because he says, that, before the commencement of this suit, to wit, on, &c. the said D. did commence a suit against the said P. by a summons, in a plea of trespass on the case, for the recovery of a certain demand, due from the said P. to the said D., upon contract, before J. H. Esq. one of the justices of the peace of the county of Saratoga ; and the said suit thereof is still depending and undetermined. And the said D. further saith, that the cause of action above, in the said declaration set forth, if any such there be, did accrue to the said P., previous to

the time of commencing the said suit before the said J. H. And the said D. further saith, that in the said summons, so issued by the said J. H., the said D. alone is named as plaintiff, and the said P. alone is named therein as defendant. And this, &c. wherefore, &c. [as ante, 680.]

This plea grows out of the decision in *Douglass v. Hoag*, 1 John. 283, by which it was decided that a previous suit on the part of the defendant, in which the plaintiff might set off his demand, might be pleaded in abatement. By a subsequent decision, 10 John. 238, it was decided, that, whether the second suit were by summons or warrant, makes no difference, even where the defendant takes his warrant upon proof that the plaintiff is about to abscond; or that there will be danger of losing the debt. This placed it completely in the power of a designing debtor many times to cheat the creditor out of his debt; or, at least, greatly to delay him in its collection; for, according to another set of decisions, under the law as it formerly existed, *vid. ante*, 495, 496, the issuing the original process, of whatever kind, was the commencement of the suit, and he had only to sue out his warrant, and hand it over to a constable, who might, through neglect or a secret understanding, keep it in his pocket, and thus harass the creditor with continual pleas in abatement, till the debtor had his full chance of escape. An attempt very like this, was made in *Wentworth v. Barnum*, 10 John. 238.

Then, to remedy this evil, came the statute, sess. 41, ch. 269, § 1, which has been substantially re-enacted in 2 R. S. 165, in the following words: "The pendency of a suit commenced by summons, shall not be a bar to a subsequent suit commenced by warrant, between the same parties, if it appear on the trial of such subsequent suit, that the defendant therein was about to abscond from the county, when such warrant issued." An actual arrest is, also, as we have seen, *ante*, 451, requisite to constitute a commencement of a suit by warrant.

That the above plea must state that the cause of action in the suit commenced by the defendant, was upon contract, so as to admit of a set off, *vid. 13 John. 210*. Saying in the plea, merely that it was an action of *trespass on the case*, will not do. This is equivocal, as it may be for breach of a contract, or for a tort. *Id.* It should show that the first action was upon contract. *Id.*

That this plea must also allege that the plaintiff's cause of action accrued to him anterior to the commencement of the defendant's suit, *vid. 7 John. 22*.

Of the replication to a plea in abatement.

Replication in case of misnomer, vid. ante, 583, 584, 585. To plea of another action pending, vid. ante, 672.

If the defendant appear by the name in which he is sued, the plaintiff may reply *that this estops him to deny that it is his true name*; 5 Bos. & Pull. 453; and all the subsequent proceedings against him, may be in that name. 1 Mass. R. 76. 2 Str. 1218. 6 T. R. 234, 235, 236. Ante, 583, 584, 585.

The plaintiff may either deny the plea in abatement, and go to trial upon the issue thus formed, or reply new matter, and upon an issue go to trial on this, or he may demur, according to the fact or law of his case. Vid. 1 Chit. Pl. 402, 403. A demurrer need not be special. Ante, 677.

2. OF PLEAS IN BAR.

Pleas in bar, the general definition of which has been before given, ante, 667, either deny that the plaintiff ever had any cause of action, or admit that he had, and insist that it was determined by some subsequent matter. (a) The most usual in practice are arranged under the following heads:

A TABLE PRESENTING A SHORT VIEW OF THE DEFENCES IN BAR TO ACTIONS IN A JUSTICE'S COURT.

N. B. The letters e. u. g. denote that the matter may be given in evidence under the general issue; and are usually followed by references to the authority, by which its admissibility under that issue is established. The letters n. e. u. g. denote that it is not admissible under that issue; and are usually followed with the like references, to show that it must be specially pleaded.

DEFENCES TO ACTIONS ON CONTRACTS NOT UNDER SEAL.

FIRST.

Deny that there ever was a cause of action:

I.

Deny that a sufficient contract was made:

1. That no contract was in fact made.
2. Defendant incapable to contract, by reason of,
 1. Infancy. (b) [e. u. g. 1 Chit. Pl. 417. 9 John. 141. 5 id. 152.]

(a) 1 Chit. Pl. 407. Gould's Pl. ch. 2, § 39. (b) Vid. ante. 265.

2. Lunacy, drunkenness, &c.(c) [e. u. g. 1 Chit. Pl. 417.]
3. Coverture, *at the time* of the contract,(d) but *coverture since making* the contract must be pleaded in abatement. 1 Chit. Pl. 417. [e. u. g. id.]
4. Duress.(e) [e. u. g. id.]
3. Insufficiency of consideration,(f) [e. u. g. id.] illegality of consideration,(g) [e. u. g. id.] or made under a mistake.(h) [e. u. g.]
4. The act stipulated to be done illegal,(i) or impossible. [e. u. g. 1 Chit. Pl. 417.]
5. The form of the contract insufficient under the statute of frauds, &c.(j) [e. u. g. id.]

II.

Admit a sufficient contract, but show that, before breach, there was, [e. u. g. 15 John. 230. 4 Taunt. 165. Mason, 437.]

1. A release. [e. u. g. 1 Chit. Pl. 418. 4 Taunt. 165. 4 Yeates, 349.]
2. A parol discharge. [e. u. g. 1 Chit. Pl. 417.]
3. Alteration in terms of contract, by consent. [e. u. g. id.]
4. Non-performance, by the plaintiff, of a condition precedent.(k) [e. u. g. id.]
5. Performance of contract. [e. u. g. 1 Chit. Pl. 417. 13 John. 56.]
6. Payment. [e. u. g. id. 11 John. 531. 2 id. 346.]
7. Contract become illegal or impossible to perform. [e. u. g. 1 Chit. Pl. 417.]

SECOND.

Admit that there once was a cause of action; but avoid it by subsequent matter, [in general, e. u. g. Vid. 5 John. 230. 4 Taunt. 165. Mason, 437.]

(c) Vid. ante, 265.

(d) Id.

(e) Id. 264, 265.

(f) Id. 47, 48, 49, 66 to 70, 173 to 182.

(g) Id. 70, 174, 180, 240 to 265.

(h) 1 Stark. R. 434.

(i) Ante, 240 to 259.

(j) Id. 50 to 54, 268 to 284. That this is a proper plea in *assumpsit*, vid. 15 John. 425.

(k) Ante, 44, 45, 46, 593, 594.

I.

Disability of the plaintiff to sue, being,

1. An alien enemy.(l) [n. e. u. g. 1 Chit. Pl. 419, 20; but it is e. u. g. if the contract were made during the war. Id.] (1)
2. An insolvent debtor.(m) [e. u. g. 1 Chit. Pl. 418.]

II.

The defendant not liable, being an insolvent debtor. [n. e. u. g. 1 R. S. 782, § 32.]

III.

Cause of action discharged :

1. By payment. [e. u. g. 1 Chit. Pl. 418. 11 John. 531.]
2. Accord and satisfaction. [e. u. g. 1 Chit. Pl. 418. 2 John. 346.]
3. Tender. [n. e. u. g. 1 Chit. Pl. 420.]
4. An account stated, and a negotiable security given. [e. u. g. 1 Chit. Pl. 418.]
5. Arbitrament. In pleading this, the defendant need not aver performance of the award on his part. 11 John. 189. [e. u. g. 1 Chit. Pl. 418.]
6. Former recovery, or trial and final judgment upon the same matter. [n. e. u. g. 12 John. 455. 10 id. 111. Id. 246.]
7. Judgment in an action brought by the defendant against the plaintiff, in which he either did, or ought to have set off his demand. [n. e. u. g. 12 John. 455. 10 John. 111. Id. 246.]
8. Higher security given. [e. u. g. 1 Chit. Pl. 418.]
9. A Release. [e. u. g. id.]
10. Statute of limitations. [n. e. u. g. id. 420.]
11. Set off. [n. e. u. g. id.]

N. B. *That the rules of admitting evidence under the general issue, are very nearly the same both in assumpsit, and debt on simple contract, vid. 1 Chit. Pl. 422.*

(l) But if not made during war, this must be pleaded in abatement, or in bar, ante, 668. 1 Chit. Pl. 419.

So where a married woman suing alone, has no interest in the contract, her coverture is evidence under the general issue, but if she have a right to join in the action, this must, in general, be pleaded in abatement. Ante, 669. 1 Chit. Pl. 417.

(l) Ante, 668.

(m) Id. 554.

DEFENCES TO ACTIONS ON CONTRACTS UNDER SEAL.

FIRST.

Deny that there ever was a cause of action.

I.

No deed in fact made, or that it was delivered as an escrow. This plea is technically called non est factum.(1) *It merely puts the execution of the deed in issue, but admits the other averments in the declaration.*(o)

II.

Deed invalid.

1. Defendant's incapacity to contract, which includes,

1. Infancy.(p) [n. e. u. g. 1 Chit. Pl. 425. 12 John. 338. 6 Cranch, 219.]
2. Lunacy.(q) [e. u. g. 1 Chit. Pl. 425.]
3. Coverture.(r) [e. u. g. id. and 12 John. 338.]
4. Duress.(s) [n. e. u. g. 1 Chit. Pl. 425.]

2. Illegality of consideration or contract, [e. u. g. id.] insufficiency of consideration. [n. e. u. g. 2 R. S. 328, § 97, 98.] And if the deed be void by statute, as for usury, gaming or other cause, this must be pleaded specially. [1 Chit. Pl. 425, and 12 John. 338.]

3. Deed obtained by fraud. As that the deed was read falsely to an illiterate man, or one deed fraudulently substituted for another.(u) [e. u. g. id.]

4. Contract impossible to perform. [n. e. u. g. 1 Chit. Pl. 426.]

(1) This is the general issue to an action of debt on specialty. 1 Dunl. Prac. 448. Where the deed is in itself the foundation of the action, as a bond, or any sealed contract for the payment of money, even though extrinsic facts are mixed with it, 8 John. 82, *nil debet* is not admissible, if objected to by demurrer; though otherwise, if the plaintiff do not demur. But if the deed be merely inducement, as in debt for rent on an *indenture* of lease, or on a *jail bond*, in which the action arises from the subsequent *occupation* or *escape*, the defendant may plead *nil debet*, which puts the plaintiff on proof of all the allegations in the declaration, and the defendant may give the same things in evidence, under this general issue, as are admissible under the same plea in an action of debt on simple contract; a release, payment, eviction, &c. 1 Chit. Pl. 423. 1 Cowen, 670. 7 Wen. 456. 11 John. 474. A notice of special matter, to be given in evidence on the trial of the cause, may be subjoined to a plea of *non est factum* in debt on bond. 4 Wen. 519, S. P. 2 id. 517. In covenant, there is strictly no general issue, and in general, all matters of defence must be specially pleaded. Vid. 14 John. 248. 1 Dunl. Prac. 453.

(o) 10 John. 47. 14 id. 89. 10 Wen. 202.

(p) Ante, 265.

(q) Id.

(r) Id.

(s) Ante, 264, 5.

(u) 12 John. 337. 13 id. 490.

III.

Admitting that deed was originally valid, excuse of performance.

1. Erasure, interlineation, &c. [e. u. g. 1 Chit. Pl. 425.]
2. Deed become impossible to perform. [n. e. u. g. 1 Chit. Pl. 426.]
3. Become illegal to perform. [n. e. u. g. id.]
4. That the plaintiff is not damaged, called *non damnificatus*. [n. e. u. g. id.]
5. No award, &c. This is a plea to an *arbitration bond*, that the arbitrators made no award pursuant to the bond, upon which the plaintiff must reply, and set forth an award assigning a breach.(v) [n. e. u. g. id.] So, also, a demand and refusal of the award, which, by the terms of the bond, is to be ready for delivery by such a day, cannot be given in evidence unless specially pleaded. 10 John. 143. But the defendant may show, under a plea of no award, that the arbitrators awarded on a matter not submitted to them. 16 John. 227.

IV.

Performance pursuant to the deed. [n. e. u. g. 1 Chit. Pl. 426.]

1. Payment at the day.^f [n. e. u. g. id.]
2. Performance, &c. [n. e. u. g. id.]

V.

It is also a good defence, that the defendant offered to perform, but was prevented by the act of the plaintiff.(w) [n. e. u. g. id.]

SECOND.

Admit that the plaintiff had a cause of action, but avoid it by subsequent or other matter.

I.

Disability of the plaintiff to sue.

1. Alien enemy.(x) [e. u. g. id. 425, 417; but n. e. u. g. if plaintiff became so after contract made. id. Ante, 668.]
2. Insolvent debtor.(y) [n. e. u. g.]

(v) 1 Chit. Pl. 501.
(w) 13 John. 56.

(x) Ante, 668.
(y) Id. 554.

II.

Cause of action discharged.

1. By payment after the day.(z) [n. e. u. g. 1 Chit. Pl. 426.]
2. Accord and satisfaction.(a) [n. e. u. g. id. 7 Cowen, 224.]
3. Tender. [n. e. u. g. 1 Chit. Pl. 426.]
4. Arbitrament.(b) [n. e. u. g. id.]
5. Former recovery, or trial and final judgment of the same matter on the merits. [n. e. u. g. id.]
6. A former trial and judgment, in which the plaintiff ought, but neglected to set-off his demand. [n. e. u. g. id.]
7. Release. [n. e. u. g. id.]
8. Presumptive limitation. [n. e. u. g. id.]
9. Set-off. [n. e. u. g. id.]

DEFENCES TO DEBT ON RECORD OR JUDGMENT.

FIRST,

Deny that there ever was any cause of action.

I.

Nul tiel record, i. e. *no such record*. This plea merely puts the record in issue, and prevails, either where there is no record, or one differing from that set forth in pleading. Com. Dig. Pleader, 2. W. 13, Record, C. Str. 1171. 3 Mod. 41. This is also the only plea by which the record of a judgment in a foreign state can be put in issue. 7 Cranch, 481. 3 Wheaton, 234. Notice of special matter cannot be given with the plea of *nul tiel record*. 1 Wen. 70.

II.

To a judgment in a justice's court, *nil debet*, i. e. *not indebted*, &c.

SECOND,

Admit that there once was a cause of action.

I.

Disability of the plaintiff.

1. Alien-enemy.(c) [n. e. u. g. 1 Chit. Pl. 417.]
2. Insolvent debtor.(d) [n. e. u. g.]

(z) 2 R. S. 277, § 25, 26.

(a) Ante, 571, 2.

(b) Ante, 692.

(c) Ante, 668.

(d) Id. 554.

II.

Defendant not liable to be sued, having been discharged under the insolvent act. [n. e. u. g.]

III.

Matter in discharge.

1. Payment.(1) [n. e. u. g. 1 Chit. Pl. 427.]
2. Release. [n. e. u. g. id.]
3. Levied by *feri facias*.(e) [n. e. u. g. id.]
4. Levied by *capias ad satisfaciendum*, i. e. an execution against the body. [n. e. u. g. id.]
5. Levied by execution in a justice's court. [n. e. u. g. *a justice's judgment being equivalent to a specialty*. 16 John. 233, 1 Hayw. 18. 1 Chit. Pl. 427.]
6. Implied limitations. [n. e. u. g.] (f)
7. The statute of limitations, *to an action on a justice's judgment*. 2 R. S. 224, § 18, sub. 2. [n. e. u. g.]
8. Set-off. [n. e. u. g.]
9. Former recovery, or trial and final judgment of the same matter on the merits. [n. e. u. g.]

DEFENCES TO ACTIONS ON STATUTES.

FIRST.

Denial of the charge.

1. *Nil debet*, i. e. that he is not indebted, or does not owe, &c.(2) This is also a good plea to an action on a jail bond for an escape from the liberties.(g) (3)
2. Not guilty. This may sometimes be pleaded to an action of debt on statute, but *nil debet* is the proper plea.(h)

(1) 2 R. S. 277, § 25, 26. Where a plaintiff founds his action upon a record of judgment, and the defendant, instead of pleading that there is no such record, relies for his defence on the fact of payment of the judgment, he admits the existence of the judgment, and takes upon himself the burden of proving it. By the court, 9 Cowen, 302, 3.

(2) Under this plea, the statute of limitations may be given in evidence. 1 Chit. Pl. 428.

(3) And under this plea, any matter in discharge of the action may be given in evidence; as for instance, that at the time of the alleged escape, the party in execution was not a lawful prisoner, in the custody of the sheriff. 7 Wen. 454.

(e) Ante, 409.

(f) 2 R. S. 228.

(g) 11 John. 474. Vid. 7 Wen. 454.

(h) 1 Chit. Pl. 428.

3. Prior action depending for the same offence. [n. e. u. g.]
4. Former recovery for the same offence.(i) [n. e. u. g. 1 Chit. Pl. 428.]

DEFENCES IN ACTIONS FOR TORTS OR WRONGS.

I.

Deny that the defendant is guilty of the wrong complained of.

1. In trespass on the case, properly so called,(1) or trover,(2) not guilty of the premises.
2. In trespass, not guilty of the trespasses, &c.

II.

Justify the act.

1. In trespass to personal property, distress for doing damage,(j) for rent, &c.(k) [These and the like defences are, in general, n. e. u. g. Vid 1 Caines, 253. Holt's N. P. R. 478, 482. 11 John. 132.] (3)
2. To real property. Title in the defendant, &c. [n. e. u. g. 2 R. S. 168, § 59.] Title in a third person, [n. e. u. g. id.] Right of common, ways, &c. [n. e. u. g. 1 Chit. Pl. 440.] License, &c. by the party, [n. e. u. g. id.]

(1) In all actions of this kind, cognizable before a justice, every matter in bar may be given in evidence under the general issue, except the statute of limitations, and a retaking on fresh suit, in an action against a sheriff or keeper of a jail for an escape. 1 Chit. Pl. 436. 2 R. S. 356, § 67. Vid. also 1 Stark. R. 97. 14 John. 389.

(2) In this action, all matters may be given in evidence under the general issue, except a release and the statute of limitations. 1 Chit. Pl. 436. If the defendant plead specially what amounts to the general issue, it is bad on special demurrer. 10 John. 289.

(3) In this action of trespass to personal property, the defendant may, under the general issue, show property out of the plaintiff; but where the act is, at common law, *prima facie*, a trespass, any matter of justification or excuse, or done by virtue of a warrant or authority, must, in general, be specially pleaded. But vid. next note (1) Thus, a justification for cutting ropes, or killing dogs, or taking guns, &c. or a distress for rent, if made off the demised premises, as on a common, or under a fraudulent removal; or a seizure of goods under a by-law, or for *damage feasant*, &c. must be specially pleaded. 1 Chit. Pl. 438, 9. Vid. also 4 Campb. 136. But a distress for rent on the demised premises may, by statute, 2 R. S. 415, § 30, be given in evidence under the general issue.

(i) Vid. 6 John. 101.

(k) Id. 421 to 436.

(j) Ante, 372 to 389, 436 to 441.

III.

Excuse the act.

1. In trespass, inevitable necessity. [n. e. u. g. 1 Chit. Pl. 440.]
2. Escape of cattle by defect of fences, &c. (l) [n. e. u. g. id.]
3. Chasing sheep, intermixed with the plaintiff's, &c. [n. e. u. g. id.]

SECOND.

Admit that plaintiff *once had* a good cause of action, but that it *was discharged* by,

1. Accord and satisfaction. [n. e. u. g. 1 Chit. Pl. 441.]
2. Arbitrament. (m) [n. e. u. g. id.]
3. Tender of amends, for a casual or involuntary trespass or injury. (n) [n. e. u. g. id.]
4. Former recovery, or a trial and judgment on the merits for the same cause. [n. e. u. g. id. 12 John. 455. 10 id. 111. id. 246.]
5. Distress for the same cause. (o) [n. e. u. g. id.]
6. Release. [n. e. u. g. id.] N. B. A release, in trespass, by one tenant in common, plaintiff, is a bar to all. 13 John. 286.
7. Statute of limitations. [n. e. u. g. id.] (1)

(1) A fruitful source of litigation in this, and indeed every country, is to be found in the wrongs committed by, or alleged against *officers*, in the abuse or discharge of their rights and duties; as in entering on lands, breaking open buildings, seizing goods, making returns, &c. &c. for which, sometimes, as we have seen, an action of trespass or trover, and sometimes an action on the case, is proper. Ante, 397 to 417; also 334 to 341. And a variety of other persons, as well as a great number and diversity of officers, are authorized, in numerous instances, to do certain acts, by statute, for which similar actions may be and frequently are brought.

Hence, in order to the more effectual protection of such officers and their assistants, and others acting under the authority of statutes, it is provided, 2 R. S. 277, § 28, that "every action against any public officer appointed under the authority of the state, or elected by the people, and against any person specially appointed, according to law, to execute the duties of any such public officer, for or concerning any act done by such officer or person by virtue of his office, and every action against any other person, who by the commandment of such officers or persons, or in their aid or assistance, does any thing touching the duties of such office or appointment, shall be laid in the county where the fact complained of happened, and not elsewhere."

And by sec. 29, that "in every such action the defendant may plead the general issue, and give the special matter in evidence, without notice."

And it is further provided by sec. 30, that "in every action hereafter brought against any person, for any act done by authority of any statute of this state, the defendant may plead not guilty, or may make avowry, cognizance or justification of the act done, alleging therein that the same was done by authority of such statute, specifying the chapter and title containing the same, or referring thereto in

(l) Ante, 374 to 389.
(m) Id. 692.

(n) Id. 369. 2 R. S. 457, § 20.
(o) Ante, 388.

EXPLANATIONS OF THE ABOVE TABLE, IN CERTAIN PARTICULARS, NOT ELSEWHERE NOTICED IN THIS TREATISE.

1. From these divisions, we may perceive, that pleas in bar are of two kinds. 1. They *deny* that the plaintiff *ever* had the cause of action complained of: or 2. They admit that he *once had* the cause of action, but

some other manner with convenient certainty, without expressing any matter contained in such statute." And by sec. 31, that "to every such plea, the plaintiff may reply that the defendant did the act complained of, in his own wrong, without the authority of any statute of this state. Upon the trial of any issue so joined, the whole matter may be given in evidence by both parties."

Under the last two sections, it will be seen, that the defendant may plead either the general issue or a special plea, and upon an issue in either of these ways, the whole matter may be given in evidence. If the special form be adopted, the parties, both in their plea and replication, must adhere strictly to the language of the statute, setting forth neither more nor less than its provisions authorize; otherwise the pleadings will be bad on general demurrer. 15 John. 183. For this reason, the safer course for the defendant would be, in all such cases, to plead the general issue simply.

For remarks upon section 23, above quoted, *vid. ante*, 23. By this section, and the succeeding one, the provisions of the "act for the more easy pleading in certain suits," 1 R. L. of 1813, p. 115, § 1, are extended to *all public officers*, so as to include commissioners of common schools, &c. according to the act of 1820, p. 107, county superintendents of the poor, &c., and also so as to include persons *specially deputed* by courts or justices, who were always held within the equity of the old statute. The old act was moreover confined to actions of *tort*; the present statute applies to *all actions* against public officers. *Vid.* 3 R. S. 721, 2, in Appendix. It should moreover be remarked, that the defences in these cases may be interposed *without notice* given with the plea. The same provisions, authorizing the defendant to plead the general issue, and give the special matter in evidence, is extended to actions against officers of the militia, and persons acting under their command, by 1 R. S. 317, § 6. Similar provisions are contained in a variety of other statutes.

The party who delivers process to the officer, for the purpose of having it executed, is not considered the aid or assistant of the officer within these statutes, and is, consequently, not within their protection. If sued, therefore, he must plead his justification specially, as in other cases. 1 Caines, 253. 11 John. 132.

Yet it was held, in one case, that where the party does no further act than merely to deliver his process, (an execution for instance,) to the officer, upon and by force of which *alone*, and not in consequence of any *instructions* given, the act complained of is done by the officer, this shows the defendant not guilty, and it is, therefore, competent for him to show the delivery and execution of the writ under these circumstances, upon the general issue. 1 Caines, 253.

The fact of an officer's having received an indemnity, does not deprive him of his rights under the above statute. And where he levies upon goods in the possession of the defendant in an execution, and such goods are in fact the property of another, this act will be considered as done by virtue of his office. 5 Wen. 265.

It is a universal rule, applicable to all cases, in all actions cognizable before a justice, that matter which does not constitute a complete bar of the plaintiff's action, but which merely goes to diminish the amount of his claim to damages, whether such matter arise either before or after the commencement of the suit, is proper evidence under the general issue. *Vid.* Co. Litt. 233, a. 2 Bos. & Pull. 225. 1 John. 47, 52, 53. 11 John. 175. And I cannot see why this should not be the case under any issue, if such matter arise after the issue is joined in the cause. *Vid.* 11 John. 175, 6, &c. Indeed, this rule is laid down unqualifiedly in Co. Litt. 233, a, without regard to the nature of the issue, or the time when the matter arose, or the kind of action, but that wherever the matter cannot be pleaded, there it may be given in evidence.

insist that it *no longer exists*, on account of some matter alleged in the plea.(p)

II. The defendant, as to most of the matters above marked, as being evidence under the general issue, has his election, either to plead such matter in bar specially, or give it in evidence, as there noted, with the general issue. On this head, the rule, in relation to all matters of defence in bar, is this: matter which denies what the plaintiff would, on the general issue, be bound to prove in the first instance, in support of his action, may and ought to be given in evidence under that plea; but any ground of defence, which admits the facts alleged in the declaration, but avoids the action by matter, which the plaintiff would not be bound to prove or dispute in the first instance, on the general issue, may be pleaded specially.(q)

III. Though the defendant plead, specially, that which amounts to the general issue, the defect is mere form, and objection must be made by special demurrer;(r) as if, in trover, the defendant plead that the plaintiff consigned him the goods to sell, which he sold pursuant to the order of the plaintiff, the plea amounts to the general issue, and is bad; for it shows that there was no conversion. 10 John. 289.

IV. *General issue.*—The form of this plea in the different actions, of which we are treating, is as follows:

Richard Roe, }
ads. }
James Jackson. }

The title of the cause to be varied according to the fact as mentioned ante, 590, and 456, 457. Vid. also ante, 467, under which come the words of your plea.

1. *In assumpsit.*—The said D. says, that he did not undertake and promise in manner and form as the said P. hath above thereof declared against him. (This plea is called in short, *non-assumpsit*.)

2. *In debt, on simple contract.*—*Justice's judgment—on statute, on a deed where it is mere inducement to the action*, vid. ante, 693, n. (1).—That he doth not owe the said sum above demanded, or any part thereof, in manner and form as the said P. hath above thereof declared, (called *nil debet*.)

3. *In debt on specialty.*—That the said instrument in writing [*bond or*

(p) 1 Chit. Pl. 413.

(r) Co. Litt. 303. b. 5 Bac. Abr. 372.

(q) Id. 442. Vid. also 10 John. 289. 8 Cranch, 31. Vid. Grah. Prac. 2d ed. 19 id. 302. 15 id. 425. 2 id. 346. 8 237. Cranch, 31. 11 Wen. 654. 7 Cowen, 35.

indenture, &c.] is not his deed, in manner and form, &c. [*as before,*] (*called non est factum.*)

4. *In covenant.*—No general issue. Ante, 695, n. (1.) *The denial of the deed, same as in debt on specialty.*

5. *In trover and trespass on the case, properly so called.*—That he is not guilty of the premises above laid to his charge, in manner, &c. (*called not guilty.*)

6. *In trespass.*—That he is not guilty of the trespass, [*or trespasses,*] above laid, &c. [*as in the last.*]

V. INFANCY.—Any person under twenty-one years of age is an infant.^(s) When his simple contracts are void, vid. ante, 265. How far he may be a party to a bill or note, vid. ante, 165, 166. His contracts under seal are voidable by *plea* of infancy only. His other contracts executed, as where he exchanges goods, or buys them and pays a sum of money, (except for necessaries,) are voidable, and the goods, or money delivered, or paid, may be recovered back.^(t) So, with the manumission of his slave.^(u) The amount of this rule is, that when they come of age, and are capable of considering over again what they have done, they may then either ratify or disaffirm their contracts before executed. But where an infant having a general guardian, sold a horse belonging to him, the infant; and there was no proof that he delivered the horse with his own hand, and the vendee afterwards offered to sell the horse: *Held*, that trover lay by the infant even before coming of age, without any demand of the horse from the vendee.^(v) “The general rule is that an infant cannot avoid his contract executed by himself, and which is therefore voidable only, while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant; or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive; and such was the doctrine of *Zouch v. Parsons*, 3 Burr. 1794. Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases; and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be this: that where the infant can enter, and

(s) Bac. Abr. tit. Infancy and Age, (A). (u) 11 John. 132.
(t) Id. (I), 3. 11 John. 132. 6 Mass. (v) 9 Cowen, 626. Vid. also, 7 id.
R. 80. 9 Cowen, 626. 179, S. C.

hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time ; but where the possession is changed, and there is no legal means to regain and hold it in the mean time, the infant, or his guardian for him, has the right to exercise the power of rescission immediately. Now the common law gives no action or other means by which the mere possession of personal property can be reclaimed, and held subject to the right of avoidance." Per Jones, Chancellor, 9 Cowen, 628, 629. Vid. 15 Wen. 631, 636 ; 2 Kent's Com. 3d ed. 235, 6.

An infant may, before arriving at majority, defend against the enforcement of his unexecuted agreements, or enforce his contracts against others in the course of a suit ; and this is by suit only ; for he has no power of himself to settle, release, or arbitrate his claims,^(w) except indeed, that he may arbitrate with the consent of his guardian.^(x) Accordingly, where he contracts to deliver, and the article is taken without his actual delivery, the taker is a trespasser.^(y) Yet he may insist on a purchase or contract for his own benefit, as to pay him a debt, deliver him goods, &c. and have an action for the breach thereof, and, if he have received a delivery of the article, he may retain it until he come of age, and then avoid his agreement.

"The law authorizes an infant to avoid contracts made during minority, but there are cases at law which show that if the contract has been executed, and the infant will avoid it, he must restore the consideration. An infant cannot ratify a lease to himself, and avoid a covenant in it to pay rent. Bac. Abr. Leases, B. Nor can he hold lands conveyed in exchange, and avoid the transfer of those with which he parted. Co. Litt. 51, b ; 4 Cruise, 142. And it is suggested, 1 N. H. Rep. 37, Roberts v. Wiggin, that where an infant takes a deed of land, and gives back a mortgage to secure the purchase money, he cannot avoid the mortgage, and hold under the deed. In 15 Mass. R. 359, Badger v. Phinney, it is held, that where goods are sold to an infant, who represented himself as of full age, on credit, and he avails himself of his infancy to avoid the payment, the vendor may reclaim the goods, as having never parted with his property in them. And that such infant, having sold and delivered goods, and received the money for them, must restore the money before recovering the goods. In Roof v. Stafford, 7 Cowen, 182, the same principle is recognized and approved. It is particularly necessary, at the present day, when emancipation is so common, and when minors, who

(w) 6 Mass. R. 80.

(x) 3 Atk. 614. 3 Caines, 253. Comb. Vid. 9 Cowen, 626.

(y) Bac. Abr. tit. Infancy and Age, (I).

may not be known as such, are so frequently sent forth by their parents to act for themselves without the intervention of a guardian, that courts should be careful that infancy, while it furnishes protection to the minor, should not be made a means of fraud and oppression upon others." Per Parker, J. 6 N. H. R. 339. Vid. also 8 Cowen, 84. Waterman's Justice's Manual, 2d ed. 46, 7.

The note of an infant is merely *voidable* and not *void*; and a promise to pay made after he attains to full age, renders the note valid. But if the promise be conditional, performance or the happening of the condition must be affirmatively shown to sustain an action; and where the promise was to pay as soon as *he could*, held that no recovery could be had without proof of ability to pay. 17 Wen. 419. Vid. 3 id. 479.

An infant may avoid a usurious contract entered into by him, and recover the money lent upon such contract under the count for money had and received; and evidence of the affirmance of such a contract after the arrival of the party to full age, to be effective, must be *express*, and not rest in *inference* or *construction*. 19 Wen. 301.

If a father, during the infancy of his child, sell chattel property belonging to the child, and for the purpose of having it replaced by other property, and the father purchases other property and gives it to the child, but it remains in the possession of the father, *who at the time is insolvent*, such substituted property does not become the property of the child, but is the property of the father, and subject to a levy under an execution against him. 15 Wen. 631.

The holding of a note taken by a plaintiff, in payment for work done by him during his minority, eight months after he arrived at age, before he offered to return it to the defendant, is, in judgment of law, a ratification of the contract, especially where in the meantime the maker of the note has become insolvent, the debt lost, and the offer to return made on the heel of that event. 11 Wen. 85. We have seen, ante, 265, that an infant may bind himself to pay for *necessaries*, which includes meat, drink, apparel, physic, good teaching, instruction and the like, they being actually necessary, charged at reasonable prices, and suitable to his degree and estate, of which things the justice or jury are to judge. But he cannot bind himself for necessaries in carrying on his trade; for the law will not entrust him to trade, as it might ruin him; but necessaries for his wife or lawful child, are necessaries for him. Even in these cases, he cannot bind himself for any sum certain, or settle and state an account for them, so as to lay the foundation of a suit upon a balance struck, or conclude himself by giving a note or bond; for the law will consider all such things void, and drive the plaintiff back to his original consideration, and

fix the necessities and the price as they should be. (z) We before noticed, ante, 265, that when the infant lives with his parent, he is not liable even for necessities, nor is the parent, in general, liable for such necessities.

Accordingly, where a son of the defendant, who lived in his family, and was decently clothed, according to his father's circumstances, bought a coat at the store of the plaintiff, but there was no evidence of the father's consent to this, and the justice gave judgment for the price against the parent, the supreme court reversed the judgment; and laid down the following doctrine on this subject:

"A parent is under a natural obligation to furnish necessities for his infant children; and if the parent neglect that duty, any other person who supplies such necessities, is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary, will depend on the precise situation of the infant, and which the party giving the credit, must be acquainted with at his peril. *Simpson v. Robertson*, 1 Esp. R. 17. *Ford v. Fothergill*, id. 211. In the case of *Bainbridge v. Pickering*, 2 Wm. Bl. R. 1325, *Gould, J.* says, with great propriety: 'No man shall take upon himself to dictate to a parent what clothing a child shall wear, at what time they shall be purchased, or of whom; all that must be left to the discretion of the father or mother. Where the infant is under the control of the parent, there must be a clear and palpable omission of duty, in that respect, on the part of the parent, in order to authorize any other person to act for, and charge the expense to the parent.'" (a) On this subject the late Chancellor Kent holds the following language: "A father is not bound by the contract of his son, even for articles suitable and necessary, unless an actual authority be proved, or the circumstances be sufficient to imply one. Were it otherwise, a father who had an imprudent son, might be prejudiced to an indefinite extent. What is necessary for the child, is left to the *discretion of the parent*; and where the infant is under the control of his parent, there must be a clear omission of duty as to necessities, before a third person can interfere, and furnish them, and charge the father. It will always be a question for a jury, whether, under the circumstances of the case, the father's authority was to be *inferred*. If the father suffers the children to remain abroad with their mother, or if he *forces* them from home

(z) Bac. Abr. tit. Infancy and Age, (a) 18 John. 480.
(1), and vid. ante, 265.

by severe usage, he is liable for their necessities." Vid. 2 Kent's Com. 3d ed. 191, 192, and the cases there cited in notes.

In general, an infant cannot bind himself, even with the consent of his guardian, unless his acts are deemed by a court of chancery beneficial to him; (b) but his bond is voidable, even though, at the time of making it, he fraudulently alleged that he was of age. (c) He is not bound, though he enter into a contract by the consent of his father. (d)

A father may authorize his son to contract with an employer and receive his wages for his own use; but the facts that the son was out at service, and the father received his wages, of themselves show no relinquishment of the father's property in the son's labor. 2 Watts, 406.

Infancy is a personal privilege, of which the infant alone can avail himself; and, accordingly, an adult cannot plead the infancy of his co-defendant. (e)

For further particulars under this head, vid. ante, 265, also, 165, 166.

As to what acts of an infant are *void*, and what are *voidable* only, vid. per Bronson, J. 15 Wen. 634 to 637.

An infant is liable to a fine or penalty imposed by statute, the same as any other person; e. g. for not training, or disobedience of orders in militia; for such fines, &c. are incurred not *civilly* but *criminally*. (f)

Infants are liable for trespasses, in the same manner as adults. 3 Wen. 391. And if an infant who has a horse on hire, wilfully and intentionally injure the animal, it amounts to an election on his part, to disaffirm the contract of hiring, and an action of trespass lies against him for the tort. 2 id. 137. But a plea of infancy, with an averment that the injury happened through the unskillfulness, want of knowledge, discretion and judgment of the defendant, would be a complete answer to an action of trespass brought for killing a horse, let to hire, by violent driving and cruel treatment. Id.

VI. LUNACY, DRUNKENNESS, &c.—Of lunacy, we have spoken before. (g) This defence, with that of drunkenness, proceeds upon the ground of an utter incapacity to yield that rational assent, which forms a necessary ingredient in all contracts. Both are determinable from the circumstances of the case, like other questions of fact. If the defence be drunkenness, it should be such a state of intoxication, as creates a com-

(b) 7 John. 557.

(c) 1 John. Cas. 127.

(d) 10 John. 453.

(e) Vid. 2 John. 279. 5 id. 160.

(f) 4 Mass. R. 376. 12 id. 271.

(g) Ante, 265 to 268.

fix the necessaries and the price as they should be. (i) ticed, ante, 265, that when the infant lives with his father, even for necessaries, nor is the parent, in general, liable for necessaries.

Accordingly, where a son of the defendant was and was decently clothed, according to his rank, and a coat at the store of the plaintiff, but without the father's consent to this, and the judgment was given against the parent, the supreme court has laid down the following doctrine on this subject.

"A parent is under a natural obligation to support his infant children; and if the parent, in connection with the facts who supplies such necessaries, is liable. (j) Where the defence, in the delinquent parent, for insanity, as the insanity of the defendant at the time, on the part of the parent, the plaintiff offered evidence to prove, that before the precise situation, the defendant was of sound mind, he took a mortgage credit, must be admitted. (k) certain responsibilities which he had assumed for the mortgage. Esp. R. 17. For example, in *Pickering*, 2 V. 17, where the note in suit originated, and that after the execution of the note, while the defendant was again of sound mind, he received 'No man shall be bound for the note, which the defendant was again of sound mind, he received child shall' that must be admitted for the note; it was held that such evidence was admissible, that must be admitted to ratify or confirm a contract originally void, but as conducing to infant to prove a recognition of it by the defendant, as a valid contract, and that pab' he was of sound mind when he executed it. (k)

The arguments of counsel and the opinion of the court in the case of *Jackson v. King*, 4 Cowen, 207 to 221, afford, of themselves, a valuable treatise on that branch of the law which respects the defence of lunacy. The case has never, we believe, been overruled or questioned, at least by our own courts; and although the rule which it establishes in regard to the degree of derangement or imbecility of mind, which renders a party incapable of contracting, has been considered by many as too strict and confined in its operation, yet it must be regarded as the law of the land, and entitled to the consideration of undoubted authority. That case holds, that where an act is sought to be avoided, on the ground of mental disability, the proof lies with him who alleges it, and that sanity is to be presumed until the contrary appears; but that after a general

(h) Vid. 3 Campb. 33, and note (a).
Vid. also 15 John. 503. Bull. N. P. 172.
1 Stark. R. 126. 18 Ves. 12. 2 Verm.
R. 97. 2 Paige, 30. 1 Green's N. J.
R. 233. 1 Hill's So. Car. R. 313.

(i) 5 Barn. & Cress. 170.
(j) 4 Conn. R. 203.
(k) Id.

is shown, it then is incumbent on the one who insists that to show sanity, i. e. a lucid interval, *at the very time* med. The case further establishes the rule, that dis- account of derangement or imbecility of mind, is lunatics, or persons *non compos*(1)—that mere is not enough—an *entire loss of reason* must ess of understanding is an item in the proof court of law will relieve, where fraud is d affirmative evidence.

drunkenness, there are cases to show that it is the intoxication arises by the contrivance of the his is not, however, the true rule; for drunkenness does, in many cases, amount to insanity; and whether volun- or brought about by the other party, makes no difference in the effect produced. Our statute treats intoxication as a species of insanity, which, when it becomes habitual, renders the drunkard an unfit person to be entrusted with the management of his estate.(*m*) And in *Barrett v. Buxton*, 2 Aik. 167, it was expressly decided that a contract made by a man when deprived of the exercise of his understanding by intoxication, is voidable by himself, though the intoxication was voluntary, and not produced through the circumvention of the other party.(*n*)

VII. COVERTURE.—We also hinted this defence, ante, 265; but it deserves further notice. That the note, bill, &c. of a *feme covert* is absolutely void, vid. ante, 166.

An action will not lie against a married woman, upon a contract made by her during *coverture*, with or without seal, nor can she sue or be sued upon such contract in her own name, even though she have a separate maintenance, secured by deed, paid regularly, she living at the same time apart from her husband;(o) or though she be separated from her husband under a sentence of divorce *from bed and board*.(*p*) The only ex-

(1) The term "*non compos*," of unsound mind, are legal terms, and import a total deprivation of sense. Vid. per Woodworth, J. 4 Cowen, 217, citing 2 Mad. 569. Vid. also 1 Beck's Med. Jur. 6th ed. 581, *et seq.*

(*l*) Vid. 3 P. Wms. 130, n. (A). Vid. also 4 Desaus. Ch. R. 364. 6 Munf. 15. 1 Bibb, 406. 1 South. R. 361. 1 Hen. & Munf. 70. 1 Wash. R. 164. 3 Rep. Const. Ct. So. Car. 27. 2 Hayw. 394. 4 Serg. & Rawle. 438.

(*m*) Per Walworth, Ch. 2 Paige, 31.

(*n*) Vid. 2 Kent's Com. 3d ed. 451. Vid. also 2 Paige, 31, where it is decided that voluntary drunkenness will not pro-

tect a person from liability for torts, or from punishment for crimes committed while in that situation.

(*o*) 17 John. 167. 8 T. R. 545. 2 Bl. R. 1079. 2 Bos. & Pull. 105. 5 id. 148. 1 Taunt. 217.

(*p*) 6 Maule & Selw. 73. 3 Barn. & Cress. 291. Otherwise as to a divorce *from the bonds of matrimony*. 1 Gow's R. 10.

ception is, 1. Where the husband has been banished the state for a crime, by the sentence of a court of justice ;(g) or, 2. Where her husband is an alien enemy.(r) But not even then, if she is by birth an alien and the wife of an alien, and her husband has ever lived with her in this country, although he be abroad in foreign service at the time of suit brought.(s) A third exception was once said to be, where the husband resided out of the state, without any probability of returning, and his wife represented herself and contracted as a *feme sole* ;(t) but this has been again and again overruled.(u)

But the death of a person will be presumed after a certain term of absence ; and where it was proved that the husband went away from the country twelve years before, it was held that unless the wife proved him alive within seven years, her plea of coverture could not be supported.(v) And so, where the husband went to sea, and had not been heard of in twelve years, it was held that the wife might be sued as a *feme sole*.(w) And, in general, where no account can be given of a person in seven years, his death is presumed, in analogy to the statute, 19 Car. 2, c. 6, with respect to leases dependent on lives, and the statute of bigamy, 1 Jac. 1, c. 11 ; correspondent to which are our statutes, 1 R. S. 740, § 6, 2 id. 74, § 5 ; except that our statute of bigamy adopts five instead of seven years.(x) So, a person sentenced to imprisonment for life is deemed civilly dead. 2 R. S. 586, § 20. Vid. also 10 John. 232.

A sale of the husband's goods by the wife is void, and he may have trover for them.(y)

When a wife is co-plaintiff in an action arising on contract, no cause of action can be included, unless it be founded on a contract with her before marriage, or she be the meritorious cause of action ; and her interest must expressly appear on the face of every count. And in an action for a tort for a personal injury, if the wife be joined, the declaration must proceed only for torts to her individually, and not for such wrongs as only affect the husband.(z)

The husband is entitled to whatever the wife earns, or becomes due to her

(g) 1 T. R. 6.

(r) Vid. Reeve's Dom. Rel. 100, and cases there cited. Vid. also 15 Mass. R. 31.

(s) 3 Camp. R. 123.

(t) 1 Ld. Raym. 147.

(u) 1 Salk. 646. 2 Wils. 808. 1 Bos. & Pull. 339. 4 id. 80. 2 Esp. R. 18.

(v) 2 Campb. R. 113.

(w) 18 John. 141.

(x) Vid. id. 143, per Spencer, C. J. 6 East, 80, 84.

(y) Com. Dig. tit. Baron and Feme.

(z) Vid. 1 Chit. Pl. 6th Lond. ed. 232. Vid. also 2 Caines, 221. 2 Bl. R. 1236. 2 Maule & Selw. 396.

by contract, during coverture, and may sue in his own name therefor ;(a) and he is moreover entitled to all her choses, both in action and possession, which were hers at the time of the marriage ; and actions for the recovery of them must be in the name of both. The true rule is, that in all cases where the cause of action survives to the wife, the husband cannot sue alone. 10 Pick. R. 433. The wife's choses in action, though uncollected during her life time, belong absolutely to the husband, if he survive.(b) But otherwise, if she outlive him. They then survive to her. He is also liable for all debts and demands against her, arising before coverture, if sued for during coverture ; though not after her death,(c) even though he expressly promise to pay.(d) It is well settled that the husband cannot be sued alone upon a contract of the wife when sole and before marriage. 15 John. 402, 3. 8 id. 150. Neither should he be permitted to prosecute alone upon such a contract. Reeve's Dom. Rel. 126. As a husband cannot maintain a suit in his own name, to recover a demand which accrued to his wife before marriage under contract made with her, the wife *must* be joined in the action. So also where a husband performs the stipulations of a contract entered into by his wife before marriage, which if performed by her whilst sole would have given her a right of action, the action for the recovery of a demand thus arising must be brought in the joint names of husband and wife. 13 Wen. 271.

Upon the death of the wife, the responsibility of the husband is absolutely destroyed ;(e) and upon the same principle, the wife, if she survive, is liable upon contracts made by her before marriage.(f)

While the wife lives with the husband, all her contracts for necessities shall bind him, for his assent to these shall be presumed, unless the contrary expressly appear ;(g) and so, though she live separate from him, if the articles furnished be suitable to her condition in life.(h) So, if he leave his wife or send her away, or use her so cruelly, that she cannot live with him ; but these are all the proper debts of the husband : the wife cannot be sued for them.(i) He is not, however, liable even for necessities, if she elope without cause, except it be after she has applied

(a) Vid. 1 Barn. & Ald. 218. 3 T. R. 631. And it is a general principle, that that which the husband may discharge alone, and of which he may make disposition to his own use, for the recovery of this he may sue without his wife. Per Boddridge, J. in 3 Bulst. 164. Vid. also 1 Barn. & Ald. 224.

(b) 9 John. 112.

(c) Vid. cases cited 1 Com. on Con. 184.

(d) 7 T. R. 344. 3 P. Wms. 409. 8 John. 149. 15 id. 403. Ante, 556.

(e) Vid. Com. Dig. Baron and Feme, (2 C.) Rep. Temp. Talb. 173.

(f) 7 T. R. 350. 1 Campb. 189.

(g) Vid. cases cited 1 Com. on Con. 186.

(h) 12 John. 428. 11 Wen. 33.

(i) Vid cases cited 1 Com. on Con. 186 to 190.

to him to return ;(k) but, if the elopement was adulterous, he is not bound to receive her again, and an application to return, will, consequently, not revive his liability. If, however, he does receive her, whether the elopement be adulterous or not, he is accountable as before.(l) And where the elopement, though voluntary, was not adulterous, and a friend, without the wife's authority, requested the husband to receive her, which he refused upon grounds other than the want of such authority, it was held to revive his liability for necessities.(m)

If a tradesman trust the wife, after the husband has forbidden him, he cannot recover, and it is sufficient for the husband to give general notice, (by advertisement for instance,) that people do not trust his wife ;(n) and this should be done, wherever the husband means to protect himself from liability, in all cases of voluntary separation, and the settling a separate maintenance ; for until these things become matter of reputation in the neighborhood where the parties reside, the husband will continue liable.(o) Such advertisement, however, will make it matter of reputation and protect the husband(p) as effectually as reputation from any other cause ; and this general reputation in the place where the husband lives is sufficient, though it do not extend to the place where the debt was contracted.(q) But in case of elopement, though the tradesman have no notice of this, if he trusts the wife, the husband is not liable.(r)

The husband is not liable if the wife live apart from him on a separate maintenance, by deed or writing, which is regularly paid and known or published as above mentioned.(s) But such maintenance must be settled in writing, and some payment must be shown.(t) And where a husband professes to provide for his wife, who lives apart from him, it is incumbent for a party who has been expressly forbidden to give credit to her, in order to render the husband liable for subsequent supplies, to show affirmatively and clearly that the husband did not supply her with necessities suitable to her condition. And where the wife when furnished with provisions in large quantities, sells them, the husband is excused in adopting the mode of providing for her by sending her meals to her, if the supply be abundant and of good quality.(u)

Where a married woman has a separate estate vested in a trustee, and

(k) 12 John. 293.

(l) 3 Esp. R. 225.

(m) 12 John. 293.

(n) 1 Ld. Raym. 444, 5. 11 Wen. 33.

(o) Id. 8 John. 72, 3.

(p) Id.

(q) 12 Mod. 244.

(r) 1 Ld. Raym. 444, 5. 1 Str. 647.
2 id. 706. 12 Mod. 372.

(s) Id. 12 Mod. 244. 8 John. 72. 16
id. 38. 5 Bos. & Pull. 148.

(t) 8 John. 72, 3. 5 Bos. & Pull. 148.

(u) 8 Wen. 544.

services are rendered on account of the estate, and the credit for such services is given to her, the husband is not liable for them.(v)

A wife may act as the agent of her husband, and a subsequent acknowledgment, or ratification of her acts by the husband, is evidence of and equivalent to an original authority.(w) And the wife in the absence of the husband, is considered as having a general authority to exercise a usual and ordinary control over his property unless it be expressly shown he has constituted some other one his agent for that purpose.(x)

If a man and woman live together, and pass in the world as husband and wife, the man is liable for her necessities or contracts, the same as if she were in fact his wife.(y)

In a suit for necessities furnished the wife, in a state of separation from the husband, it must of course be proved by the plaintiff, that the articles furnished were suitable to the state and degree of the husband.(z)

VIII. ALTERATION IN TERMS OF CONTRACT BY CONSENT.—The parties may by consent, vary the terms of their contract at any time before breach; and a written, or even sealed agreement may be thus enlarged or modified by parol.(a) But where a time of payment is mentioned in a writing, or where no time is specified, in which case the law construes it payable immediately, no parol agreement made at the execution of the contract, fixing the time of payment different from its terms or legal import on the face of the writing, is admissible; for this would be to vary a written contract by parol.(b) Nor will a subsequent parol agreement to vary the first be binding, where the first would, if by parol, be void by the statute of frauds; for instance, where such first agreement concerns land, &c.(c)(1)

(1) A subsequent parol agreement, not contradicting the terms of the original contract, but merely in continuance thereof, and in *dispensation* of the *performance* of its terms, as in prolongation of the time of execution, is good, even in this case of a contract reduced to writing under the statute of frauds; as in the case of a contract to deliver goods at a stipulated period, parol evidence of a subsequent agreement for an extension of the time of delivery is admissible; 1 Maule & Selw. 21; *vid.* 3 T. R. 691; and parol evidence is admissible to show that a party, apparently a principal in the agreement, was in fact only an agent. 15 East, 272. 7 Taunt, 295. So, a contract under seal may be entirely *waived* by a parol agreement, and the latter stand in its place; more especially if the parol agreement shall have been executed. Thus, where the plaintiff, by an instrument under seal, agreed to erect a building for a fixed price, which was not an adequate compensation, and having done part of the work refused to proceed, but upon a parol promise by the defendant that he should be paid for his labor and materials and should not suffer, he went on and finished the building; it was held, that he was entitled to recover in *assumpsit* upon the parol promise. 9 Pick. R. 298.

(v) 2 Wen. 454.

(w) 4 *id.* 465.

(x) 10 *id.* 79.

(y) *Vid.* 1 Com. on Con. 214, and cases there cited.

(z) *Id.* 192.

(a) 1 John. Cas. 22. 3 John. 528.

(b) 8 John. 189.

(c) 15 *id.* 204, per Thompson, C. J.

IX. CONTRACT ILLEGAL OR IMPOSSIBLE TO PERFORM, OR BECOME SO.

—Of contracts illegal in their origin, enough was said, ante, 240 to 268. A contract to do an act *physically impossible*, at the time of contracting, is also void, and no action lies for its violation; as, to build a large house in a day, to go to Rome in a day, &c.(d) And it is the same in law, if the act *become* illegal, as if a statute should pass, preventing the performance of the contract, or rendering it *criminal*; though if part only be prohibited, the rest must be performed.

So when the thing stipulated becomes *physically impossible* by the act of God, (or as Sir William Jones will have it, “*inevitable accident*,”)(e) this equally excuses the performance; as if a lessee covenant to leave timber standing, which is blown down by a tempest, or agree to restore a horse which dies of disease, without the borrower’s fault; or where A. contracts with B., to serve him a year at a certain salary, to be paid at two several times, and B. dies before the year has expired, and after the first payment; in the first two cases, the lessee or borrower would be discharged, and in the last, A. loses the rest of his salary, and is discharged from his service. But in all these cases the agreement must be performed as near its intent as may be.(f) And so of other the like cases.

X. AN INSOLVENT DEBTOR.—When the assignees of an insolvent must sue on his debts, vid. ante, 554.

We omit the further consideration of this subject, to which several pages were devoted in the first edition of this work. Since the “Act to abolish imprisonment for debt and to punish fraudulent debtors,”(g) went into operation, applications to be discharged from debts and imprisonment are extremely rare, and the law on this subject has therefore ceased to be of much practical importance. We simply refer, for the provisions of the statutes and the decisions under them, to 1 R. S. 776 to 807, and cases cited in the margin. Cowen’s Treatise, 1st ed. 432 to 440. 1 Kent’s Com. 3d ed. 422. 2 id. 392, 393.

XI. HIGHER SECURITY GIVEN.—This is where one having a debt due by simple contract, accepts a security for the same debt by an instrument under seal; as if the debt be reduced into a bond, covenant or mortgage. So, if a judgment be taken or obtained upon any contract, it operates as an extinguishment thereof. But a contract is not extinguished, if the security be only of equal or inferior degree; and a judgment without satisfaction, must be upon the very contract itself, claimed

(d) Vid. Powell on Con. 160 to 165, and cases there cited.

(e) Jones on Bailm. 104, 5.

(f) Vid. Powell on Con. 444 to 451, and cases there cited.

(g) Sess. Laws of 1831, p. 396.

to be discharged by it, and not upon some other security given in its stead ; otherwise it is no extinguishment of the original contract, without actual payment or satisfaction, &c. The higher security must be executed by the party to the first, in order to extinguish it, and not by a third person ; though, if one partner give his bond for a partnership debt, it has been held an extinguishment thereof. An infant's bond, being void, will not extinguish his contract for necessities, and so I presume, upon the same principle, no security which is void can operate as an extinguishment ; as if it be void for duress, coverture, usury and the like.(h)

Within the above principle it has been decided, that a bond and mortgage will not extinguish a sealed note ;(i) a bond and warrant of attorney for the amount of a previous judgment, will not extinguish the first, though judgment be entered upon the bond ;(j) and a judgment on a covenant to pay rent, contained in a lease, will not extinguish the right of distress upon the same lease for the same rent.(k) And a judgment in a justice's court is not extinguished by a judgment subsequently obtained upon it in another justice's court ; the general principle governing such cases being, that a security of a *higher* nature extinguishes *inferior* securities, but not securities of an equal degree.(l)

But if the higher security, a judgment confessed, for instance, be taken merely as a collateral security to the first, it will not extinguish it, without satisfaction ; and where the second security is between different parties, and for other debts besides the original one, and not for the exact amount of that debt, it will be deemed collateral, without any express agreement to that effect.(m) The general rule is, where a simple contract security for a debt is given, it is extinguished by a specialty security, if the remedy given by the latter be co-extensive with that which the creditor had upon the former. But this does not hold, even in favor of a surety by simple contract, if it appear, on the face of the subsequent deed, that it was intended only as an additional security, and there is nothing in the deed itself expressly inconsistent with such intention ; as where B., being indebted to A., procured C. to join with him in giving a joint and several promissory note for the amount ; and afterwards, having become further indebted, and being pressed by A. for further security, by deed, (reciting the debt and the note, and that a further security had been offered,) assigned to A. all his goods, as a *further* security,

(h) Vid. Bac. Abr. tit. Extinguishment, D., and the authorities there cited.

(i) 8 John. 54.

(j) 11 id. 413.

(k) 13 id. 240. 2 Binn. 146.

(l) 9 Wen. 53.

(m) 14 John. 404.

with a proviso that he should not be deprived of the possession of the property assigned until after three days' notice; it was held, that this deed did not extinguish, or suspend A.'s remedy against C. on the note.(n)

XII. ERASURES, ALTERATIONS, &c.—It was formerly held, that when a deed was altered in a point material, either by the party or a stranger, without the privity of other parties concerned, whether by interlineation, addition, razing or drawing a pen through a line, or through any material word, or by tearing off the seal, it became void.(o) But in a modern case,(p) the court held that the alteration of an *award* by a *stranger*, even in a material part, did not invalidate the instrument, the original words being legible; observing, that such alteration could no more be considered as avoiding the instrument, than if it had been obliterated or cancelled by accident.(q) Yet there is no doubt, that a deed is rendered void by an alteration in favor of the party making it.(r) If the alteration be material in one covenant, it avoids all the covenants in the deed;(s) but where the covenantors are bound severally, tearing off one seal shall not discharge the other covenantors, for it is a distinct deed as to each.(t)

The alteration of a deed by one claiming a benefit under it, avoids it so far as respects a remedy by action upon it; and it seems that this is so, whether the alteration be material or of a part wholly immaterial; otherwise, if the alteration be by a stranger without the consent of the party.(u) So an alteration by the obligee of a bond, or the party to any other deed creating a mere chose in action, utterly avoids the deed, both as to the right and remedy upon it.(v) And where an erasure or interlineation appears in a material part of a deed, of which no notice is taken at the time of the execution, it is a suspicious circumstance, which requires some explanation on the part of the plaintiff; but whether the explanation given is satisfactory or not, is for the justice or jury to determine.(w) An alteration of a *sealed instrument*, given to secure the payment of a sum of money, if made by a person not a party, under a *parol* authority from the party executing the instrument, does not avoid it.(x)

(n) 3 Barn. & Cress. 208. 5 Dowl. & Ryl. 259, S. C.

(o) 11 Co. 28, and vid. 1 Bos. & Pull. 430, per Dallas, C. J.

(p) 6 East, 309. Vid. 15 John. 297.

(q) Vid. 3 Barn. & Cress. 428. 5 Dowl. & Ryl. 403, S. C. 6 Cowen, 746. 8 id. 71.

(r) Per Savage, C. J., 8 Cowen, 73.

(s) 11 Co. 28.

(t) 5 id. 23.

(u) 8 Cowen, 71.

(v) Id.

(w) 2 Wen. 555. Vid. 7 id. 364. 6 Cowen, 125. Bull. N. P. 255. 2 Stark. R. 313.

(x) 13 Wen. 587.

In 1 Dallas, 67, and 1 Peters' R. 369, it was held, that an erasure or interlineation shall be presumed to have been made *after* the execution of the instrument, unless the contrary is shown. But vid. 1 Keb. 22, where it is said, "An interlineation, without any thing appearing against it, will be presumed to be *at the time* of the making of the decd, and not after."

XIII. SEVERAL PLEAS, PLEA AND NOTICE.—The defendant in a justice's court should always plead the general issue, when it will answer his purpose, and not a special plea alone, especially where he is without professional assistance; for special pleading is not the element of any man, unless he be a well bred lawyer. Where it is not necessary, it only tends to endanger the defendant's cause, generally speaking, and to give both him and the justice a great deal of trouble and embarrassment.

Pleading a matter with the general issue, however, in a separate plea, which might have been given in evidence under the general issue, without having been pleaded, though it be pleaded badly, will not prevent its being given in evidence; for this is merely seeking double chance to get the matter of defence before the court, like several counts in a declaration, and though one fail, another may stand, and support the defence; and in order to give the defendant an equal chance with the plaintiff in this respect, which he had not at common law, being there confined to a single plea or defence for each cause of action stated by the plaintiff, the statute(y) authorizes the defendant to plead as many several matters as he shall think necessary for his defence, subject to the power of the court to compel him to elect by which plea he will abide, in cases where he may plead inconsistent pleas.(z) But in a *qui tam* action, the defendant can plead only one plea to each count,(a) as at common law.

Where, however, there is a right to plead double, hardly any pleas will be held inconsistent.(b) The general issue and a tender, either of part or the whole, has been held so, as presenting too great an incongruity on the record to be tolerated;(c) and that tender and alien enemy cannot be pleaded together, even to different counts;(d) nor in trespass, pleas of the general issue, alien enemy, and a justification.(e) Formerly, also, the defendant was not allowed to plead matters which required different trials, as *nul tiel record* and payment,(f) one of which must have been

(y) 2 R. S. 277, § 23.

(z) Vid. Grah. Prac. 2d ed. 244.

(a) 2 Wils. 21. Com. Dig. Pleader, E. 2, *quere*.

(b) Vid. 5 Taunt. 340.

(c) 4 T. R. 194. 5 id. 97. 4 Taunt. 459. 10 East, 326.

(d) 10 East, 326.

(e) 12 East, 206. 2 W. Bl. 1326. 1

Moore & Payne, 145.

(f) Coleman, 411; 1 John. Cas. 104, S. C. Coleman, 76.

tried by the record, and the other by the justice or jury. This distinction, however, no longer exists, all issues of fact being now triable by the justice or jury. (g) And it is doubtful whether the rule ever had any application to a justice's court. Where the defendant pleaded payment before the day and at the day, the court ordered the first plea struck out, because it might be given in evidence under the last ; (h) but the court will not be nice in discriminating between the different pleas, in order to test their consistency. (i) If the defendant rely upon title, in a defence to an action of trespass on lands, he will be confined to a special plea or notice, and will not be allowed to interpose the general issue alone, either in the justice's court, or when it comes to the court of common pleas. (j) With these exceptions, the defendant may plead as many pleas as he thinks proper, in answer to the same matter, however contradictory and inconsistent they may appear. (k) If the plaintiff have demurred, or replied to the pleas, the court will not afterwards require the defendant to elect, however inconsistent they may be. (l)

The above distinctions are, however, more formal than substantial, for by statute, (m) all matters of defence may be given in evidence under the general issue, provided the defendant give notice thereof with his plea. This is only a more easy manner of pleading the matter of defence, and the notice must include substantially the same facts truly set forth as a special plea of the same matter, (n) though it will be regarded with less strictness than the latter, in matters of form ; (o) but evidence of matter which it does not set forth, cannot be given unless admissible without notice. (p) The proper mode of testing its validity is, to see whether it would be good on general demurrer, if its matter were specially pleaded. (q) And where a notice was in general terms, that the defendant would prove that there were divers judgments, at the time of the sale of the land, &c. outstanding against the plaintiff, which were a lien upon the land, &c. and which the defendant was obliged to pay, and did pay, in order to prevent a sale of the premises, &c. ; but without specifying any particular judgment, so as to enable the plaintiff to know in whose favor, at what time, and in what court, such judgments were obtained, that he might be prepared to prove that they were fraudulent and had been reversed,

(g) 6 Wen. 512.

(h) 1 John. Cas. 152.

(i) Id.

(j) 2 R. S. 168, § 59. 2 Caines, 28.

(k) Grah. Prac. 2d ed. 245, and cases there cited.

(l) 1 John. Cas. 246 ; Coleman, 91, S. C.

(m) 2 R. S. 277, § 24.

(n) 8 John. 455. 13 id. 475. 10 id. 142. 8 Wen. 570. 14 John. 89.

(o) Id. *ibid.*

(p) 11 John. 494.

(q) 13 id. 475.

or otherwise satisfied and vacated, which the supreme court held to be defective, 20 John. 144, the court of errors held it to be sufficient, 20 John. 746; and Chancellor Kent, in delivering the unanimous opinion of the court, observes: "It strikes me as unreasonable and unjust, that the plaintiff at the trial should shut out the defence, under the pretence that the defendant did not tell him in the notice, all the particulars of these judgments, when they must have been matter of record, and the defendant stood ready to prove the judgments by the record, and to produce the executions issued thereon, and prove the payment of them. The plaintiff was informed by the notice, of the specific nature of the defence, and he could have ascertained to his own satisfaction, and with perfect certainty, before the trial, whether the defence was a good one, by searching the records, where judgments binding on the land must have appeared, if they existed." And where the defendant's attorney annexed to a plea of the general issue, a printed blank notice of set-off, without being filled up, but containing the usual concluding clause, that a certificate for the balance due the defendant would be claimed, the supreme court held the notice sufficient. M. S. Feb. term, 1829. Vid. Grah. Prac. 2d ed. 247.

This notice cannot be given, unless the general issue; or *nil debet*, to an action of debt on judgment; or denial of the execution of the instrument, to an action of covenant, be pleaded.(r) The giving notice of special matter will not, like a special plea, be construed to admit and avoid the plaintiff's declaration.(s) And as the plaintiff cannot reply to a notice, he will be allowed on the trial to give in evidence, in answer to the defence contained in the notice, any matter which, had the pleadings been special, would have formed the subject of a replication; and this, on the other hand, the defendant may rebut by evidence of facts, which would have constituted his rejoinder.(t)

Where the defendant has a right to give evidence of his defence upon the general issue, though he give notice of such matter, which varies from the evidence, this shall not be excluded by reason of the variance, and the notice may be entirely disregarded.(u) So, also, an officer joining with another in a notice of justification, is not precluded from his defence under the general issue, by such joinder in pleading.(v)

Thus, the defendant may take three chances of getting in his matter of defence. 1. It may be given in evidence under the general issue; 2. He may plead it; or, 3. He may give notice thereof with the general issue, and,

(r) 2 R. S. 277, § 24.

(s) 8 John. 109.

(t) 7 John. 111.

(u) 8 Cowen, 114.

(v) 2 Wen. 446.

in general, he may both plead and give notice thereof with the general issue, adapting his pleas and notice to every possible shape in which his proof may be expected. He is thus placed on an equal footing with the plaintiff, by whom he is assailed, perhaps, with his variety of counts.(w)

OF THE QUALITIES OF PLEAS IN BAR.

1. A plea in bar must be adapted to the nature of the action, and, accordingly, not guilty in covenant, or *nil debet* in trespass, would be bad on general demurrer ; and so of the like cases.(x)

2. Every plea must answer the whole declaration, or the particular count or counts in the declaration, to which it is intended to answer.(y) The meaning of this is, that it must state sufficient matter to show that the plaintiff cannot sustain his action, if the plea be true, in respect of the declaration, count or counts answered ;(z) but there may be one plea to one count, and another to another count in the same declaration, as we before mentioned ; and we have also just seen that, by statute, there may be several different pleas to the whole declaration, or to different counts in the same declaration, or both.(a) Each plea must be sufficient in itself, if true, to bar the entire cause of action it is intended to meet.(b) For example, a declaration in trespass contains two counts, one for trespass on lands, and another for taking goods. The defendant, to the first count, may plead a license, to the second the statute of limitations, and to both, he may plead not guilty, and any other plea or pleas, as a release, accord and satisfaction, arbitrament, &c. Where a plea is pleaded as an answer to the whole declaration, and the matter contained in it is only an answer to a part, the whole plea is bad and may be demurred to.(c) Thus, if a declaration in assumpsit contain a count on a promissory note, and also the common counts, a plea, commencing as an answer to the whole declaration, but in fact answering only the count on the note, is bad ; for the court cannot intend but that the other counts embrace substantive and distinct causes of action.(d) This rule, however, must be understood with this limitation, that the part of the declaration which is not answered by the plea, is material, and the gist of the action ; for where any thing is inserted in the declaration as matter of aggravation, the plea need not

(w) Ante, 660, and vid. 5 Taunt. 228.
Cro. Jac. 86.

(x) 1 Chit. Pl. 451, 2. Vid. also 7
John. 402. 3 id. 541. 1 Aik. R. 107.

(y) Vid. cases cited 1 Durl. Pr. 461, 2.
(z) Id.

(a) Ante, 715.

(b) 2 John. 437.

(c) 2 Wen. 419. 8 id. 615. 12 id.
402. 20 John. 204. 18 id. 28.

(d) 18 John. 30.

answer or justify that ; for the answering of that which is the gist of the action will cover the whole declaration.(e)

3. Every special plea of justification admits the truth of the declaration, or count to which it is pleaded ; and must state some circumstances, which either excuse the fact complained of, or show it to be lawful ; for if it do not admit the fact, it amounts to the general issue and is objectionable, for that reason, on special demurrer ; because, instead of pleading a long state of facts which amount to it, the general issue itself should be directly pleaded.(f) But, though it be said that a special plea admits the facts stated in the declaration, this must be understood as being when the general issue is not pleaded at the same time, and to the same matter ; for if this be the case, the plaintiff is bound to prove his whole cause of action, and each plea stands in its full force, unimpaired by any other plea. This implied admission, therefore, only respects the particular plea itself, in its relation to the declaration or count answered by it. And the plaintiff cannot avail himself even of an express admission in one plea, as evidence of a fact denied in the other.(g)

4. The plea must be single, that is, contain only one matter or point of defence. For instance, a release, accord and satisfaction, &c. cannot be jumbled into a single plea, but should be made the subject of separate pleas ; though any number of facts, calculated to make only one point of defence, must necessarily be inserted in the same plea. Thus, in justifying the seizure of goods under an execution where the action is by a stranger, the plea must set forth a judgment, an execution, the delivery thereof to the officer, that the goods were the property of the defendant in the execution, &c. ; for these, though distinct facts, must all be stated, in order to make out the point of defence, which is the right to seize the goods, and so of almost every special plea.(h)

5. The degree of certainty required, is much the same with a plea in bar, as a declaration, *vid. ante*, 577 ; but no place need be mentioned in a plea, unless it be matter of substance. 1 Chit. Pl. 460. 6 John. 26. 18 *id.* 490. 2 Caines, 370. And every traversable fact contained in the declaration and not denied by the plea, will be regarded as admitted of record, and needs no proof to support it.(i) The particular degree of certainty necessary, will be better understood by the forms which I shall give.

(e) 3 T. R. 292. 3 Wheat. 327.

(f) 1 Chit. Pl. 455. *Vid.* 10 John. 289, 291. 7 Halst. R. 171. 8 Cranch, 30. 11 Wen. 660. 13 *id.* 78. 5 Cowen, 466.

(g) 5 Taunt. 228. *Vid.* also Cro. Jac. 66.

(h) *Vid.* cases cited 1 Dunl. Prac. 462, 3, and Grah. Prac. 2d ed. 239.

(i) 7 Cowen, 281. 8 *id.* 623. 9 *id.* 295.

6. A special plea must be direct and positive, and not argumentative, that is, should directly affirm, or deny the matter to be insisted on or traversed, according to legal understanding, and not state a great variety of facts and circumstances, leaving the point of defence to argument or inference therefrom. Thus, in pleading a license to an action of trespass, instead of stating the conversation, or other facts from which you intend to have a license inferred on the trial, you are to say directly, in your plea, that the plaintiff gave you "leave and license," &c. (j) Notwithstanding this rule, however, an argumentative plea is good on *general demurrer*. (k)

7. Every plea should be so pleaded as to be capable of trial, that is to say, it should contain matter of *fact*, the existence of which may be tried by a justice or jury as an issue, or its sufficiency as a matter of defence determined by the justice on demurrer. Thus, if I be sued for taking a man's goods, and I wish to justify such taking, by pleading a levy under an attachment, it is not enough for me to say that *I lawfully took the goods under an attachment*, for this is a mere inference of law; but I must set forth the attachment, and if I was plaintiff therein, I must show in my plea, that I obtained it regularly, by stating the manner thereof, in order that it may be seen whether my inference be a just one. (l)

A defect in the 3d, 4th and 6th qualities above enumerated, could only be objected to by special demurrer. (m) A lack of the other qualities above mentioned, would in general, be matter of substance, and therefore, bad on general demurrer.

Before closing this head, it is proper further to remark, that in certain cases, the law, for the purpose of saving expense, and unnecessary prolixity in stating multifarious facts, dispenses with pleading all the facts, and allows a concise and general plea. So, where a covenant is affirmative, and comprehends multiplicity of matter, to avoid prolixity, the defendant may plead performance generally, without showing how, and the plaintiff shall assign a particular breach; as in debt on a bond, with a condition to deliver the tallow of all beasts killed by him, it is sufficient to say that he has delivered all the tallow, &c., without alleging how much he has delivered, or how many beasts he has killed. And in a plea to a bond conditioned for the performance of covenants, where there are several covenants, all of which are affirmative, it is sufficient to show performance generally. And this plea admits the deed, but denies

(j) 1 Chit. Pl. 461. 6 Cranch, 126.
9 John. 314.

(k) 9 John. 314.

(l) 1 Chit. Pl. 462.

(m) Vid. 1 Dunal. Prac. 460.

the breaches, and puts in issue all such matters as go to show that the covenant is not broken, or that the defendant was never under an obligation to fulfil the covenant declared on. But where the covenant is in the negative, the defendant must plead performance specially. So, where he pleads performance of the condition of a bond, consisting of several particular things to be performed by the obligor; so, in debt on a bond conditioned to account for all moneys received by the obligor, a general plea of performance is bad, but the defendant must show when, how, and where, he performed his covenant, for these are facts lying within his own knowledge. So, if any of the covenants are in the disjunctive, he ought to show which he has performed. General pleading is also allowed in setting forth proceedings of a court of limited jurisdiction, as to which it is sufficient to state the commencement of a suit, the court in which it was brought, and enough to show that it had jurisdiction; and thereupon such proceedings were had, that such a judgment was rendered. And in pleading a discharge under an insolvent law, it is necessary to allege the facts requisite to give the judge jurisdiction; as that the defendant was an inhabitant of the county in which the application was made, at the time he applied for his discharge, and that such proceedings were thereupon had, that the said judge discharged the defendant; and the discharge must be set forth. *Vid. Grah. Prac.* 2d ed. 240, 1. and cases cited. We quoted, ante, 698, the provisions of the statute authorizing public officers and their assistants to plead the general issue, and give the special matter in evidence without notice. We allude to the subject again at this place, for the purpose of noticing the following decisions under that statute, not before adverted to. A constable or other officer sued for an act done by him, is not entitled to the benefits of the statute, unless the act be done in obedience to the warrant, and within the jurisdiction of the court or magistrate issuing the process. 2 *Wen.* 611. Nor does the statute mean that any matter whatsoever may be given in evidence; its object being only to relieve parties from intricate special pleading, and not to allow matter to be given in evidence, which, if specially pleaded, would not be a defence. 3 *Wen.* 46. And where, in trespass against a constable and another, for taking goods on a justice's execution in one county, the action being brought in another, the jury found that the other defendant acted officiously, and not in aid or assistance, or by command of the constable, so that he, the other defendant, was not within the statute; it was held that the constable, having joined in the same plea, was also thereby deprived of the protection of the statute. 7 *Cowen*, 330. And *vid. post*, Plea of justification, and remarks thereon.

SECTION XIII.

FORMS OF SPECIAL PLEAS IN BAR.

(The commencement is as follows:—*title to be varied as directed, ante, 590.*)

<i>Richard Roe,</i> ads. <i>James Jackson.</i>	}	(1st, plead the general issue adapted to the action as directed ante, 700, 701.)
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And for a further plea, the said D. says, that the said P. ought not to have and maintain his action aforesaid thereof, against the said D., because he says, (*matter of the plea.*)

Plea of a former recovery in bar.

That on the 1st day of September, A. D. 1840, at a court held before E. F., Esq. one of the justices of the peace of the county of Saratoga, at the town of Saratoga Springs, in the said county, the said P. impleaded the said D. for the same identical cause of action, in the said P.'s said declaration mentioned; and such proceedings were thereupon had, in the same court in the plea aforesaid that afterwards, to wit, on the 10th day of September, A. D. 1840, at the said town of Saratoga Springs, the said P. by the judgment of the same court recovered against the said D. by a final judgment upon the merits, the sum of ten dollars damages, as well for the same identical cause of action in the said declaration mentioned, as for his costs of that suit.

If in debt, say ten dollars debt, (*or as the sum is,*) and also two dollars, (*or as the sum is,*) his costs of that suit, being for the same, &c.

This plea must contain enough to show that the former decision was on the merits. Thus a plea, "That in a suit, &c., judgment was rendered in his (defendants's) favor, which judgment remains unreversed or otherwise vacated, and which suit and judgment embraced and determined the matter of controversy involved in this suit," is not sufficient. Such a plea might with equal propriety be used, though the former suit had been dismissed or a nonsuit entered. 1 Stew. Ala. R. 20.

Plea of a former suit, and judgment in favor of the defendant, in which the plaintiff set off his demand.

That on the 1st day of September, A. D. 1840, at a court held before E. F., Esq. one of the justices of the peace of the county of Saratoga, at, &c. the said D. impleaded the said P. in a certain plea of trespass on the case upon promises (or as the plea is) and such proceedings were thereupon had, in that court, in the plea aforesaid, that afterwards, to wit, on the 10th day of September, A. D. 1840, at, &c. the said D., by the judgment of the said court, recovered against the said P., ten dollars damages and costs of suit, and the said D. avers, that, in the said action before the said E. F., he, the said P., did set off against the said demand of the said D., in the same action, the same identical cause of action set forth in the said P.'s declaration; which cause of action so set off as aforesaid, with the other matters in question in the said suit, were then and there heard, tried and determined by the said court before the said E. F.

Plea of a former action, in which the plaintiff ought, but neglected to set off his demand.

That the said D., after the cause of action in the said P.'s declaration in this suit mentioned, if any such there were, had accrued, and before the commencement of this suit, to wit, on, &c. at, &c. at a court held before E. F., Esq. one, &c. impleaded the said P. in a plea of trespass on the case upon contract, and such proceedings were thereupon had, in the said court, in the plea aforesaid, that, afterwards, on, &c. at, &c. the said D., by the judgment of the said court, recovered against the said P. ten dollars damages and costs. And the said D. avers, that the said P. did neglect to plead, or set off against the demand of the said D., in the action aforesaid, before the said E. F. the demand and cause of action in his declaration in this suit mentioned. And the said D. also avers, that the said suit, before the said E. F., was commenced after the cause of action mentioned in the declaration in this suit had accrued, if any such there were.

Former trial, and judgment for the defendant, upon the same matter.

That, on, &c. at, &c. at a court held before E. F., Esq. one, &c. the said P. impleaded the said D., for the same identical cause and causes of action, in the said P.'s declaration mentioned; and such proceedings were thereupon had in that court, in the plea aforesaid, that, afterwards, to wit, on, &c. at, &c. as well the said P. as the said D. appeared in the said court, before the said E. F., justice as aforesaid, and after the proofs and allegations of both the said parties were then and there heard, touch-

ing and concerning the same identical cause and causes of action in the said P.'s declaration here set forth, and the said suit before the said E. F. had then and there been tried upon the said proofs and allegations, it was thereupon determined and adjudged, at and by the same court, held before the said justice, by a final judgment upon the merits of the action in the said suit, that the said P. should go thereof without day, and that the said D. should recover against the said P. thirty-one cents, for his costs, by him expended in and about the defence of the said suit.

As these former trials must be pleaded in a justice's court, and are not admissible in evidence under the general issue, even in an action of assumpsit, or on the case, 10 John. 111, id. 146, 12 John. 455, I have endeavored to generalize the language of the above plea, so as to make it a proper form of introducing a former trial on the merits, in all possible cases, whether the trial were by jury or before the justice, without going the detailed and technical round of stating the particular cause of action, trial, verdict, and judgment, adapted thereto; the instructions upon which head would require a little volume of itself. I think I have succeeded; and that this brief and general plea will be found sufficient upon the liberal principles which govern pleas in bar in a justice's court.

If there be several counts in the plaintiff's declaration, some of which are for the former cause of action, and some for another cause, this plea may be narrowed to meet the count accordingly. And it can do no harm to meet each count separately with this plea. There are, perhaps, no instances in a justice's court, in which the plaintiff's or defendant's ingenuity is more frequently taxed, than in the effort to maintain a re-trial of a cause on the one hand, or to defeat it on the other. Sometimes when a plaintiff fails in one form of action, he will resort to another for the same cause; he has, perhaps, split a cause of action into several parts, and tried only one, and is now going for another part; his former declaration was perhaps obscure and equivocal; and it is a question many times doubtful in evidence, what was submitted and what withdrawn from the consideration of the court or jury; and so of matters which formed the subject of a set off, in a former suit. But the decisions of the supreme court on these topics, seem to meet almost every difficulty which can possibly arise.

With regard to the plea of a former trial or recovery, we have seen,^(x) that the plaintiff may sometimes elect to bring one of several kinds of actions for an injury; and from the loose manner of pleading in a justice's

(x) Ante, 564 to 568.

court, it would many times, be almost impossible, from the mere record, to preserve the identity of actions, even where they were, in both instances, intended to be for the same cause, both in form and substance. In order to obviate these difficulties, it has been determined that if the plaintiff bring one kind of action, and judgment be given against him, this may be pleaded in bar to another description of action for the same cause ; and it has been established as a rule on the subject of this plea, that the *same cause of action* is, where the evidence will support both actions in a different form, thereby making the evidence given in the first action, the test of its identity with the second. (y)

The judgment of a court of concurrent jurisdiction, or one in the same court directly on the point, is as a plea in bar, and as evidence in certain cases, conclusive between the same parties upon the same matter directly in question in another court or suit ; but is no evidence of a matter which merely comes collaterally in question, nor of matter incidentally cognizable, or to be inferred only by agreement or construction from the judgment. *Lawrence v. Hunt*, 10 Wen. 84. If it does not appear from the record that the verdict and judgment in a former suit were directly upon the point or matters which are attempted again to be litigated in a second action, the fact may be shown by parol ; provided the pleadings in the first suit were such as to justify the evidence of those matters, and that it also appeared that, when proved, the verdict or judgment must necessarily have involved their consideration and determination by the jury. *Id.* In an action by A. against B. for damages for the non-delivery of a quantity of wheat ; *it was held*, that a verdict and judgment in an action by B. against A., in which the plaintiff claimed to recover the price of the wheat, alleging a delivery of part and a readiness as to the residue, was no bar to A.'s right to recover ; B. having claimed to recover as well for rye and corn as for wheat sold, and it not appearing that any part of the verdict was for the wheat. This was so adjudged, although on the trial of B.'s suit, the recovery for the wheat was contested on the ground that the plaintiff had failed to perform his part of the contract in reference to the same. *Id.* A record of a former verdict and judgment is admissible in evidence, although between different parties, where the party sought to be affected by the evidence was a party to the former suit, in which it was sought to charge him as jointly liable with another, and which joint liability he contested on the former trial. *Id.*

Upon a plea of former recovery, a justice is bound to consider the plea proved, where the cause has been tried before himself and judgment

rendered by him, although not formally entered upon his docket. The statute, 2 R. S. 196, § 245, makes the *docket of a judgment* or other proceeding, &c. had before a justice, evidence before him, in another action; and although a judgment may not be actually entered upon his docket, yet if pronounced, it is in contemplation of law before him on his docket. 15 Wen. 557, 559, per Nelson, J.

When a demand has once been submitted to a jury, and passed upon by them, it is a complete bar to another action for the same cause,^(z) whether a judgment be entered on the verdict or not,^(a) if tried by a jury; and it is equally a bar, if the cause be finally submitted to the justice, whether he ever give a judgment upon it or not.^(b) And the particular form of the verdict or judgment will not vary its effect; for where the verdict was *no cause of action*,^(c) in one case, and in another, the justice, after having taken time to advise, suffered the plaintiff within the four days to withdraw his action, and gave judgment of nonsuit against him,^(d) the proceeding was held a bar in both instances, though the plaintiff contended that the verdict in the first was equivalent to a nonsuit, and that he had a right to withdraw and be nonsuited in the second. A verdict against the plaintiff for costs merely, without any damages, will have the same effect;^(e) and if a demand, consisting of a single item, be barely stated to the jury, among other things, who neglect to pass upon or notice it from any cause,^(f) or if a demand be submitted to, and disallowed by them,^(g) this will, in each case, operate as a perpetual bar to an action for the same; and should a subsequent jury allow such *submitted* or *disallowed* item or demand, among others properly allowable, the verdict and judgment will thereby be tainted for the whole, and reversed entirely.^(h) And where a demand is submitted, and only a part thereof allowed by a justice or jury, it is equally a bar to a future claim for the whole and every part of the claim submitted.⁽ⁱ⁾

It is upon the principle last stated, that a plaintiff is not allowed to *split* his demand, whether it sound in tort or contract; and where a constable, on an attachment against A., took three bed quilts, and one bed at the same time, the property of B., who brought a suit against him for taking the quilts only, and a trial and judgment was had thereon; B. was held barred of his further action, not only for the quilts, but the bed also, for here was one indivisible act, constituting an entire cause of

(z) 6 John. 168. 11 id. 530. 16 id. 136.

(a) 2 id. 181. Id. 191.

(b) 11 id. 457.

(c) 2 id. 181.

(d) 11 id. 457.

(e) 2 id. 191.

(f) 1d. 210. 16 id. 136.

(g) 10 id. 365. 16 id. 136.

(h) Id.

(i) 16 id. 136. 2 Str. 12, 59, S. P.

action.(j) And so where the plaintiff brought separate suits upon the same note, the first suit, though but for a small part of the note, was held a perpetual bar to a recovery of the residue, and this would not be tolerated, even in a proceeding by attachment, against an absent defendant, who is not present to plead the first trial in bar; but all the subsequent judgments will be reversed notwithstanding.(k) (1) And the same doctrine was held, where three barrels of pot-ashes were sold at the same time, and the vendor brought his action and recovered for one of them: This barred his claim for the whole;(l) for, say the court, different actions cannot be sustained for goods, unless they be sold at different times, or in different parcels. For further remarks on this subject, vid. ante, 567, 568, and the cases there cited. Vid. also 15 Wen. 557.

But there are certain judgments, as we shall see more at large hereafter, which will not operate as a bar. Thus, a nonsuit,(m) or a judgment against the plaintiff on a plea in abatement, demurrer for form, &c.(n) will not prevent a second action for the same cause. But of this, when we speak of judgments.

And the plaintiff may waive, on the trial, and withdraw from the consideration of the court or jury, any distinct cause of action, although it come within the general scope of his declaration, and yet, have his second suit therefor, declaring therein in the same form as in the first suit; and this, although the plaintiff recover under his declaration in the first suit for causes of action not waived.(o) In such cases, if the declaration in the first suit be broad enough to embrace the subject of the second action, it is, *prima facie*, evidence in bar of the second, and drives the defendant to show negatively, that, although he might, yet he did not, *in fact*, submit his cause of action in the second suit to the consideration of the court or jury in the first.(p)

And again—where there is such a total want of jurisdiction in the court trying the first cause, as would render the magistrate, &c. a trespasser for carrying his judgment into execution, as in the cases mentioned ante, 29 to 32, and 397 to 405, the first proceeding is no bar to a second suit for the same cause.(q) Thus, where a man brought *trespass* before a

(1) But where a note is made payable by instalment, at different times, a former recovery for a previous instalment is no bar to a second action for a subsequent instalment. 2 Wen. 369. Vid. 2 R. S. 158, § 3.

(j) 15 John. 432. 16 id. 136.

(k) 16 id. 121. Id. 136, S. P.

(l) 15 John. 229.

(m) 10 id. 363.

(n) Post, Judgments.

(o) 13 John. 227. 16 id. 336, S. P.

(p) 16 id. 136. 6 T. R. 607.

(q) 14 John. 432.

justice, for negligently firing a pistol, and wounding his leg, (which was in substance an action of *assault and battery*.) and the justice assumed to give judgment against the plaintiff on the merits; he afterwards brought an action of *trespass on the case*, (and he had a right to elect either form of action for such an injury,) and recovered, notwithstanding the former trial was given in evidence to defeat him, and this was held well on certiorari, upon the principle above stated.(r)

And where an endorsee of a note was defeated in his action, upon an objection taken by the defendant, (the maker,) that the endorsement was defective, this was held no bar to a subsequent action upon the same note by the payee;(s) and so, where the bearer sues the maker of a note, payable to A., or bearer, and the maker gives in evidence a former suit by the payee upon the same note, and a recovery had against the payee, this is no bar of the second suit, unless it be followed by evidence that the payee was, *in fact*, the owner or bearer of the note, at the time of the first suit.(t)

In the plea that the plaintiff had once set off his demand in a former suit, it is not necessary to distinguish by the plea, nor is it important in evidence, whether the first action was upon *contract* or *tort*; nor is it material what was the nature of the matter introduced as a set off, whether this were matter of *contract* or *wrong*. It is enough that it has once been set off, and tried, submitted, or stated for trial, and passed into the hands of a court or jury, in the form of a set off, for the purpose of being determined;(u) or, that any part of the entire demand claimed, has thus been dealt with before. Ante, 726, 7. And accordingly, a fraud in the exchange of horses,(v) a trespass,(w) or trover for a spinning wheel,(y) though not the proper subject of a set off, if objected to, yet where such, or other matters of *tort* are actually set off, it has been held that they can never be questioned again.(z)

And where a judgment is insisted on as a set off, and submitted to and passed upon by a jury, whether the same be allowed or not, the judgment is extinguished and the plaintiff concluded; and if the plaintiff subsequently sue out an execution upon such judgment, he is trespasser. 5 Wen. 240. To take a case out of the rule, that a set off thus submitted is conclusive upon the party, it should be affirmatively shown that the jury could not legally have allowed the defence. But this is where the

(r) 14 John. 432.

(s) 8 id. 442.

(t) 4 id. 222.

(u) Vid. ante, 726.

(v) 3 Caines, 152.

(w) 3 John. 433.

(y) 13 id. 184.

(z) 3 Caines, 152. 3 John. 433. 13 id. 184.

claim, which is a legal one, is disallowed or rejected by the justice or jury; if allowed, although the demand may not have been a proper subject of set off, the rule is, as established by the cases above cited—and if either a plaintiff or defendant present a demand which is legal, and proper to be allowed, if supported by sufficient testimony, and the jury pass upon it and disallow it, such demand cannot be recovered in another suit. The error of the jury may be ground for reversing the judgment on certiorari, but not liable to be reviewed in another suit. The verdict is conclusive, unless it appears that the rejected claim could not legally have been allowed. *Vid. per Savage, C. J. 5 Wen. 245.*

In the plea of a former action by the defendant, in which the plaintiff ought, but neglected to set off his demand, which is also a good plea, (a) it is essential that you state in your plea, that the first action was predicated upon contract, 13 John. 210, and that the same was commenced subsequent to the time when the plaintiff's cause of action in the second suit accrued; for, if the first action was for a *tort*, (b) the plaintiff was not bound to set off his demand, nor could he do so, unless it had existed and been due at the commencement of the suit. (c) Thus, where the plaintiff agreed to discontinue his suit, but yet prosecuted it to judgment, in an action upon such agreement, it is no objection that the demand for a breach of the agreement was not set off in the first suit; for it did not exist till judgment obtained in the first suit; 8 John. 470; and in an action on the case against a bailee, for not returning, or for misusing certain beds, &c. it was held that no set-off could be allowed, if objected to; (d) and, consequently, the first suit was no bar of the second, though this would doubtless be otherwise, if the action against the bailee had been an action of *assumpsit*, instead of an action on the case, as it might have been. (e) So, in *trover*, (f) or *trespass*, (g) in which cases he may also, sometimes, change the rights of the defendant, in this respect, by waiving the *tort* and bringing *assumpsit* for the goods wrongfully taken or converted. (h)

There are, moreover, certain demands which are not the subject of set-off in the former suit, and are consequently not barred by it. It must not only exist, (i) and be due (j) at the commencement of the first suit; but a demand for a *wrong* committed cannot be set off; and this set-off is

(a) 2 R. S. 167, § 57. 1 John. 283.
5 John. 129.

(b) 3 Caines, 85.

(c) 7 John. 22.

(d) 8 Caines, 85.

(e) Ante, 566.

(f) 11 John. 144.

(g) 7 id. 23.

(h) 7 id. 20.

(i) 8 John. 470. 1 id. 263. 7 id. 22.

(j) 7 id. 22.

only matter of right, where the claim is founded upon contract. *(k)* ⁽¹⁾ Thus, a demand on a deceit or fraud cannot be set off, if objected to, and if omitted, it is not for that reason barred; *(l)* but a demand arising on contract may be set off; *(m)* and though the justice should reject it improperly, when offered as a set-off, yet the demand is barred until such former judgment be reversed. *(n)*

But where the defendant offers a set-off, which is objected to by the plaintiff, and rejected upon such objection, whether it be a proper subject of set-off or not, the plaintiff cannot, in a future action for the demand thus rejected, avail himself of the former trial as a bar. *(o)*

In a suit by the payee of a negotiable note against the maker, it is a good defence that, while one A. was holder of the note, the defendant brought an action against A., in which A. ought to have set off the note; but if it appear that the note was over due when sold to A., and that previous to the transfer, and before the note fell due, the plaintiff had agreed to take pay for the note in ashes, and that the note was offered as a set-off in the former suit against A., but rejected on account of such agreement, this is no bar to a recovery of the note by the payee; for the note, being over due, passed subject to this agreement, *(p)* and was, therefore, properly rejected. *(q)*

If the defendant hold a contract against the plaintiff, which is broken on the plaintiff's part at the time of the commencement of the suit, the defendant is bound to set off his claim thereupon, and if he neglect to do so, he cannot afterwards recover, although all his actual damages for the breach, arise after the determination of the first suit. *(r)*

The defendant must set off his demand the very first opportunity, or it is forever extinguished. Thus, in two suits brought against the defendant, in favor of the same plaintiff, the summons in each being returnable at the same time, the defendant must set off his demand in the suit which is first called on, upon the plaintiff's declaring therein, or his right is gone. *(s)*

An illegal set-off should be objected to at the time of pleading it, or giving notice thereof, or, at least, before it has been passed upon by the jury. *(t)*

⁽¹⁾ In many cases, as we noticed, ante, 565, 6, a tort may be sued for as matter of contract, at the election of the plaintiffs; and for the same reason, undoubtedly, such a demand might be set off, vid. 13 Wen. 153, 4, 5, 6, per Mr. Senator Maison.

(k) 2 R. S. 165, § 50.

(l) 8 John. 390.

(m) 2 R. S. 165, § 50.

(n) 5 John. 129.

(o) 9 id. 352.

(p) Id. and vid. ante, 179.

(q) 9 John. 352.

(r) 3 id. 137.

(s) Id. 428.

(t) 3 Caines, 152. 3 John. 433.

The plea of a former trial in bar, must be interposed at the time of joining issue: and the defendant cannot plead the general issue, and set up the former recovery or suit at the trial. Neither a former recovery nor trial, nor a suit in which the plaintiff ought but neglected to set off his demand, is evidence under the general issue;(u) but if it is suffered to be set up under the general issue, it will not be a cause for reversing the judgment, if a good defence was made out upon another ground.(v)

Where the defendant is authorized to commence an action by warrant, notwithstanding a former suit brought against him by the plaintiff, he has, of course, the right of a trial, although the plaintiff's suit may have been previously tried. This right arises under the statute. 2 R. S. 165, § 49. But it must appear on the trial of the subsequent suit commenced by warrant, that the defendant therein was about to abscond from the county when the warrant issued. *Id.* And where the pendency of a suit commenced by summons is pleaded in bar to a suit commenced by warrant against a defendant about to abscond, the fact of the defendant being about to abscond should be replied; whether such replication be put in or not, the plaintiff is bound to prove the fact on the trial, by evidence other than the affidavit on which the warrant was obtained.(w)

In pleading a former suit by the defendant against the plaintiff, in which he ought, but neglected to set off his demand, it is essential expressly to aver, that such former suit was brought before the commencement of the second one; for otherwise it is clearly no bar. And it is not enough to state, that the former suit was commenced on a certain day, which day happens to be before the commencement of the second suit; for the day is immaterial, and the proof on the trial need not conform to it.(x)

I shall close my remarks upon the doctrine of set-off, and consider the subject more particularly, and at large, when I come to speak of the plea and notice by which the defendant's set-off is introduced. And it will be there seen, that many of the foregoing remarks are essentially modified by the statute of set-off now in force.

Of the plea in bar, that the subject of the second suit was properly matter of defence in a former action.

This bar is, both in principle and form, very nearly allied to the plea of a former trial and judgment on the merits, or a former suit and a

(u) 10 John. 111. *Id.* 246. 12 *id.* 455.

(v) 12 *id.* 455. And *vid.* 3 Cowen, 120.

(w) 10 Wen. 523.

(x) *Swartwout v. Granger*, Sup. Court, May term, 1807, M. S.

neglect to set off the plaintiff's claim. Its formal parts correspond with the latter, in the mode of stating the former action, except that the nature of the former suit should be distinctly specified, in order to show that the plaintiff was bound to set up his present cause of action, as matter of defence therein.

Thus, suppose a man has sold me a horse for \$50, and cheated me in the bargain, but had sued and recovered for the price. If I should afterwards sue him for the fraud, his plea might be in this

Form :

That, on, &c. at, &c. at a court, &c. the said D. impleaded the said P. in a certain plea of trespass on the case, upon the said P's promise to pay the said D. for the same identical horse, in the said P's declaration mentioned ; and such proceedings were thereupon had, in that court, in the plea aforesaid, that afterwards, to wit, on, &c. at, &c. the said D., by the consideration and judgment of the same court, recovered against the said P., &c. (as in the plea of a former recovery, ante, 722.)

To be varied according to the circumstances of each case.

This plea arises out of the principle recognized by the supreme court, in the case of *Le Guen v. Gouverneur and Kemble*,^(y) "that the judgment or decree of a court possessing competent jurisdiction, is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have decided." It is, therefore, sufficient to show in the plea, that the former cause has been decided, without averring, either that the matter of defence therein, forming the subject of the second action, was or was not made the subject of inquiry ; for any matter of defence, which the defendant had a right to show in the former suit, whether it would have gone to the whole cause of action, or only to have diminished the amount of the recovery, must have been there introduced, and cannot be made the subject of a separate suit, whether it were litigated or not.

Thus, where A. sold B. a patent right, and took B's note and sued him upon it, and B. on the trial, insisted and gave evidence to show that A. cheated him in the sale, which was considered by the justice, but he gave judgment for the amount of the note ; this was held a bar to B's subsequent action for the deceit.^(z)

And where A. lost a bridle, and accused B. of having taken it, who was innocent ; but being threatened by A. with a suit, B. together with

(y) 1 John. Cas. 492.

(z) 8 John. 453.

C., as his surety, gave their note for twelve dollars to A., who told B., that if he could show his innocence, or if the bridle should be found, the note should be given up. A. afterwards sued upon the note, recovered a judgment and received his money, and afterward B. and C. sued A. to recover it back, upon the ground that A. had found his bridle; but the first suit was held a bar to the second; for the subject of the second suit was matter of defence against the action upon the note; and not being shown to defeat the note, could not be made the foundation of a new suit, upon the above principle in *Le Guen v. Gouverneur and Kemble*.(a)

And so where I give a note, but have matter of defence against it, being able to show it void, or that it is paid, &c. &c. and the note is sold after it becomes due, or under other circumstances, which will let in my defence against the holder of it;(b) I am not warranted in lying by and suffering the holder to recover against me; and then bringing my action against the payee, to recover the damages for the transfer, but I must set up my matter of defence, whatever it is, in the first suit; and my neglect to do so, will create a final bar against me.(c)

So, where I bring an action for work done, the defendant must show in this first action, that the work was not done in a proper manner, if this be the case, and thereby diminish the amount of my recovery, and if he neglect to do this, he cannot sustain his future action for the injury sustained by the neglect (d)

The above cases are sufficient to show with what steady inflexibility our tribunals have adhered to the principle advanced in *Le Guen v. Gouverneur*, &c. and this rule is perhaps universal, and without exception in a justice's court; and the subject of all the numerous pleas in abatement or in bar, which we have mentioned, or could mention, must have been litigated on the defensive, if a suit have been brought and determined wherein they might have come in play as defences; and they can never afterwards, in such case, be vindicated by a distinct action.

The case of *Reab v. McAllister*,(e) contains much useful doctrine applicable to that branch of the law now under consideration. It establishes the rule, that a defendant may not only give evidence of *fraud*, but of a *breach of warranty*, in diminution of the plaintiff's claim, in an action for the price of an article sold. And *Marcy, J.* in delivering the opinion of the supreme court, (the case was afterwards carried to the court of errors, and the judgment of the supreme court affirmed,) remarks

(a) 9 John. 232.

(d) 14 John. 377.

(b) Id. Ante, 178, 9.

(e) 8 Wen. 109. 4 id. 483, S. C. in

(c) 13 John. 187, and vid. 12 id. 374. Sup. Court.

that, "Such a defence is admitted to avoid *circuity of action*. A second litigation on the same matter should not be tolerated where a fair opportunity can be afforded by the first to do final and complete justice to the parties." The opinions of the Chancellor and Mr. Senator Allen, given in the same case when in the court of errors, go to strengthen the conclusion of Mr. Justice Marcy, and contain a very able review of the authorities on this subject. It is to be remarked however, that the case does not establish the rule that a defendant is *bound* to set up a breach of warranty in mitigation of damages in an action brought to recover the value of the articles sold. It simply settles the doctrine that that defence is properly admissible; although from the strong language of Marcy, J., above quoted, it might be inferred that the court intended to go the length of declaring that such a defence *must* be interposed, and cannot be made the subject of a subsequent action. The facts of the case did not call for a decision upon the point just suggested, and hence no intimations or *dicta* of the court, *upon that question*, are entitled to the effect of binding authority. The better opinion would seem to be, that a defendant might either set up his defence in an action for the price, or resort to a cross action for a breach of the warranty. However, the question is, perhaps, a doubtful one; and in order to avoid all hazard, it would be advisable for a party to avail himself of his defence in all such cases at the very first opportunity. Indeed, he would probably be bound to do so, within the principle of the case of *Le Guen v. Gouverneur, &c.*

We come next to the consideration of the

Plea, or notice of set-off.

The revised statutes provide, that in certain cases, and under certain circumstances, therein particularly enumerated, a defendant may set off demands which he has against the plaintiff. (e) (1)

1. This set-off must be a demand arising upon judgment or upon contract, express or implied, whether such contract be written or unwritten, sealed or without seal; and if it be founded upon a bond, or other contract having a penalty, the sum equitably due, by virtue of its condition, only, shall be set off.

Under this provision, no demand is the proper subject of set-off, unless it be either a judgment, or such a claim as could be enforced by an ac-

(1) The provisions of the revised statutes have had the effect to reduce the law of set-off to certain and precise rules. Generally, they will be found conformable to the previous decisions of our courts. In some cases, however, a change has been effected. One object of the revisers was to supply some defects under the old law, which had been very generally complained of. Vid. 3 R. S. 683, 4, in Appendix.

tion of assumpsit, debt or covenant. If the demand sought to be set off be a judgment, it is immaterial upon what cause of action the same was recovered, whether arising upon contract or tort, or whether the same was rendered for costs merely. (g) If the defendant in an execution escape, the plaintiff is remitted to his former rights, the imprisonment is no longer a satisfaction, and the plaintiff may use the judgment as a set-off against a demand of the defendant, or proceed anew against his person or property. (h)

The sum due by virtue of the condition of a bond, whether for the payment of money or otherwise, may be set off; instance the case of an arbitration bond and an award in favor of the defendant, who seeks to avail himself of the award as a set-off to the plaintiff's claim. So a set-off is allowable where the action is on an award, or on a bond for the non-performance or non-payment of an award. (i) And the sum due on a bond may be set-off against any demand recoverable under the common counts, or for which *indebitatus assumpsit* will lie; and a plaintiff cannot, by declaring *specialty*, when he can recover his demand under a *general count*, deprive the defendant of his set-off. (j)

A tavern bill against any person other than a lodger or traveller, for more than one dollar and twenty-five cents, is not the subject of a set-off; for the reason, that under our statute, (k) no such demand can be recovered by suit, even on an express promise to pay. (l)

2. It must be due to the defendant in his own right, either as being the original creditor or payee, or as being the assignee or owner of the demand.

Therefore, in an action against a man for his own debt, he cannot set off a demand due to him in right of his wife; or as executor or administrator; or as assignee of an insolvent, imprisoned, absent, concealed or absconding debtor. (m)

A debt due to the defendant, as a surviving joint creditor, may be set off against a demand on him in his own right. (n) And, on the other hand, a debt due from the plaintiff, as a surviving debtor, (o) to the defendant, may be set off against a debt due from the defendant to the plaintiff in

(g) Vid. Edw. Treat. 3d ed. 59. Vid. also 8 Cowen, 304.

(h) 5 Wen. 240.

(i) 5 John. 105.

(j) 15 Wen. 51.

(k) 1 R. S. 678, § 11.

(l) 7 Wen. 326.

(m) Vid. Edw. Treat. 3d ed. 59. Vid. also Bull. N. P. 179. 7 T. R. 344. 8 John. 149. 15 id. 403, 404. Vid. ante, 556. Willes, 103, 264, n. a.

(n) 5 T. R. 493. 1 Esp. R. 47, S. C.

(o) Vid. ante, 553, 556.

his own right.(p) When the maker may set off a debt due from the payee, &c. against a subsequent holder or endorsee of a promissory note, vid. ante, 178, 179, to which it may be added, that where the holder buys the note, even before it is due, with full notice of the maker's demand, and an intention to defraud him of his set-off, the rights of the latter will not be affected by such disingenuous conduct; but he shall be allowed his set-off, notwithstanding.(q) It is a general rule, that debts or demands between persons who are not parties to the suit, cannot be set off;(r) but there are several exceptions to this rule,(s) as we shall see more at large hereafter. Thus, the defendant may set off a bond executed by the plaintiff, and assigned by the obligee to the defendant; or any other debt assigned to the defendant, previously to the commencement of the action, although he could not have maintained an action upon it in his own name.(t) (1) A party who has neither a *general* or *special property* in goods placed by him into the hands of a manufacturer for finishing, who refuses to deliver them on demand, cannot set off the value of such goods in an action of *assumpsit* against him by the manufacturer, for work and labor bestowed upon other goods. And a receiptor to the sheriff for goods levied upon by execution, would not, under such circumstances, be entitled to claim a set off.(u)

3. It must be a demand for real estate sold, or for personal property sold, or for money paid, or services done; or if it be not such a demand, the amount must be liquidated, or be capable of being ascertained by calculation.

The demand, under the first clause in the above paragraph, must be one for which an action of *indebitatus assumpsit* might be sustained at common law; as for the consideration money of land sold,(v) an action to recover which may be sustained, although the conveyance contain the usual receipt of payment, if proved by parol that payment was not in fact made.(w) And such demand may be set off, although the amount

(1) But a judgment purchased by a defendant with the view to set it off, and with a condition that if he fails to obtain the set-off the assignment shall be void, cannot be set off—to warrant this the defendant must purchase absolutely. 7 Cowen, 469. Vid. also, 7 id. 480.

(p) 6 T. R. 582.
 (q) Vid. 1 John. 319. 1 John. Cas. 342. 8 John. 152. 17 id. 330. 19 id. 170. 2 Bay, 481. Ante. 64, S. P.
 (r) 12 John. 276. 1 John. Cas. 169. (u) 10 Wen. 399. 13 id. 139, S. C. in court of errors.
 3 John. Ch. R. 569. (v) 14 John. 165. Id. 210. 20 id. 338.
 (s) 13 John. 9. (w) Id. *ibid*.

be unliquidated, or not ascertained by the parties.(x) Any other demand arising on contract, may also be set off, if the amount be liquidated, that is, ascertained by the agreement or settlement of the parties; or if the amount be capable of being ascertained by calculation merely, as a bill of exchange or promissory note for the payment of money; or a written contract for a sum certain, though payable in specific articles; or a written contract for specific articles, at a value or price stipulated in the contract.(y) In the language of Mr. Senator Ma-son, in *Butts v. Collins*, 13 Wen. 139, 156, 157, "Unliquidated damages are such as rest in opinion only, and must be ascertained by a jury,(1) their verdict being regulated by the peculiar circumstances of each particular case; they are damages which cannot be ascertained by computation or calculation—as, for instance, damages for not using a farm in a workmanlike manner; for not building a house in a good and sufficient manner; on warranty in the sale of a horse; for not skilfully amputating a limb; for carelessly upsetting a stage, by which a bone is broken; for not making repairs to a dwelling house; for unskilfully working the raw materials into a fabric; and other cases of like character, where the amount to be settled rests in the discretion, judgment or opinion of the jury. *Hewlet v. Strickland*, 1 Cowp. 56. *Freeman v. Hyatt*, 1 W. Black. 394. *Weigall v. Waters*, 6 T. R. 488. *Livingston v. Livingston*, 4 John. Ch. R. 287. *Hepburn v. Hoag*, 6 Cowen, 613. In these and the like cases, there is no data given for computation; nor can the damages be ascertained by any mode of calculation. It is otherwise as to the amount due on a note; or on a merchant's account; or for work, labor and services; or for a yard, a piece, or a bale of flannel; the damages in such cases can be readily ascertained by calculation."(z)

4. It must have existed at the time of the commencement of the suit, and must then have belonged to the defendant.

A debt may be set off, which accrued to the defendant subsequent to the time when the plaintiff's cause of action arose;(a) but not if it accrued after the action was commenced;(b) and accordingly, where a defendant, after a writ issued against him, bought a note against the

(1) Or, to apply his language to a justice's court, by a *justice* or *jury*.

(x) Vid. Edw. Treat. 3d ed. 60. (a) 2 Maule & Selw. 510. 1 East, 375. 16 id. 138.
 (y) Id. (b) 3 T. R. 186. 3 John. Cas. 145, 150. 15 Wen. 51 to 63. Id. 559. 148. 8 John. 470, 471. 19 id. 322.

plaintiff, with the intent to set off the same against the plaintiff's debt, this was held inadmissible; for where a right of action is vested, and an action commenced, nothing can deprive the plaintiff of his right to recover, except some act done by himself in relation to that right.(c)

5. It can be allowed only in actions founded upon demands which would themselves be the subject of set-off, according to law.(d)

Thus, a set-off is not allowable against a claim for uncertain, and unliquidated damages, e. g. in debt for the penalty in articles of agreement, by which the defendant covenanted to maintain the plaintiff, &c. and provide him with proper medicine and attendance.(e)

6. If there be several defendants, the demand set off must be due to all of them jointly.

A separate debt to one of the defendants, cannot be set off against a joint debt due from all the defendants; nor can a debt due to the defendant and another, or others, jointly, be set off against a debt due from the defendant alone;(f) unless there was an agreement between the parties, in relation to their dealings, that such debts might be set off against each other.(g) But where the plaintiff owes a debt to several persons jointly, one of whom owes him, the latter may acquire the right of set-off against the plaintiff, by taking an assignment to himself alone, of the debt due from the plaintiff, before the plaintiff's suit is commenced.(h) And where I agree, in writing, to work for A., and B. guarantees by endorsement, that I shall do it in a particular manner, and I sue A., he may set off damages for a breach of the contract to do the work, against my claim; for B. is a mere guaranty, and is not jointly liable with me.(i) (1) An objection that a joint debt cannot be set off against a separate one, must be made at the trial, or it would clearly not avail the party on certiorari.(j)

If the demand be due from the plaintiff and another to only one of the defendants, it is not admissible as a set-off; and though it be claimed by the defendants, and allowed by the jury as a set-off, the claim being, in

(1) Under the present statute, damages for a breach of contract in such a case, could not be used as a set-off, for the damages are clearly unliquidated. Evidence of a breach of the contract, would, however, be admitted in mitigation of the plaintiff's claim for work, and by way of recoupment of damages. Vid. 20 Wen. 61.

(c) 3 John. Cas. 145. 1 Caines, 71, 72. Ch. R. 569, 573. 5 Cranch, 34. 1 Wash.

(d) Vid. 13 Wen. 339.

79. 5 Munf. 388.

(e) 6 Cowen, 613, 615, and the cases there cited. Vid. also 3 John. 150.

(g) 2 Taunt. 170.

(h) 17 John. 330.

(f) 11 John. 70. 10 id. 250. 3 John.

(i) 10 id. 250.

(j) 11 id. 70.

fact, due to but one defendant, and *not payable at the time*, this is no bar to a subsequent action for the same demand, *when it becomes payable*, in favor of the defendant to whom it was really due.^(k)

A demand against a private company cannot be set off against a note payable to the agents of such company and prosecuted by them in their individual names, although the note was taken for the benefit of and belongs to the company. Nor can a demand belonging to one of two defendants, be set off against a demand on both defendants.^(l)

7. It must be a demand existing against the plaintiff in the action, unless the suit be brought in the name of a plaintiff who has no real interest in the contract upon which the suit is founded; in which case no set-off of a demand against the plaintiff shall be allowed, unless as specified in the statute, and as we shall hereafter notice.

It seems that demands against *individual partners* may be set off against demands of the firm, if the course of dealing of the firm, in receiving such demands in payment, is *uniform*, and so *notorious*, that persons dealing with them must be supposed to have had reference to it in their transactions with the firm.^(m)

We shall notice more at large, the law applicable to this provision of the statute, when commenting upon the next succeeding subdivision of the 50th section. They are so intimately connected together, that one may be considered as in fact embracing the other.

8. If the action be founded upon a contract, (other than a negotiable promissory note or bill of exchange,) which has been assigned by the plaintiff, a demand existing against such plaintiff or any assignee of such contract, at the time of the assignment thereof, and belonging to the defendant in good faith before notice of such assignment, may be set off to the amount of the plaintiff's debt, if the demand be such as might have been set off against such plaintiff or such assignee, while the contract belonged to him.

For the purpose of rendering this provision of the statute as simple and understandable as may be, we give the case stated by Mr. Edwards, in illustration of this subdivision of the law of set-off.⁽ⁿ⁾ If a note, not negotiable, be given by A. to B., and assigned by B. to C., and by C. to D., in a suit on such note against A., which must be in the name of B., the payee, A. may set off to the amount of the note only; either, 1st, a

(k) 6 Cowen, 261.
(l) 8 Wen. 400.

(m) 7 Wen. 326. And vid. 4 id. 583.
(n) Edw. Treat. 8d ed. 60.

demand against B., the plaintiff, which was in existence at the time of the assignment by B. to C., and which if it were not originally due to A., was assigned to him in good faith, before he had notice of the assignment by B. to C.; or 2d, A. may set off a demand against C., the first assignee, which was in existence at the time of the assignment by C. to D., and which, if it were not originally due to A., was assigned to him in good faith, before he had notice of the assignment by C. to D.; or 3d, A. may set off a demand against D., which was in existence at the time of the commencement of the suit, and then belonged to A., either as the original creditor or as assignee. In all these cases, the set off is governed by the other provisions of the statute, as to the nature of the demand set off, and that upon which the action is founded. Vid. also the case of *Mead v. Gillett*, 19 Wen. 397, where it is held, that in a suit in the name of an assignor for the benefit of the assignee of a contract, (not negotiable,) the defendant can set off only such demands as existed against the assignor, and in good faith belonged to the defendant *at the time of the assignment*; demands subsequently acquired cannot be set off, although the defendant become the holder of them *without notice of the assignment*.

Where A. gives a note not negotiable, which is assigned, and he afterwards promises to pay the note to the assignee, A. cannot, (though the suit be brought in the name of the payee,) set off a demand, which arose before giving the note against the payee, for it is to be presumed, from his giving the note, (and his promise renders the presumption irresistible,) that such set-off had been paid or satisfied, especially in the absence of all explanation.(o)

9. If the action be upon a negotiable promissory note, or bill of exchange, which has been assigned to the plaintiff, after it became due, a set-off to the amount of the plaintiff's debt, may be made of a demand existing against any person or persons, who shall have assigned or transferred such note or bill after it became due, if the demand be such as might have been set off against the assignor, while the note or bill belonged to him.

Under this provision of the statute, if a negotiable promissory note be given by A. to B., which, after it has become due, is assigned or transferred by B. to C., and by C. to D.; in a suit on such note in the name of D. against A., he may set off to the amount due on the note, only, either 1st, a demand against B., the payee of the note, which was in ex-

istence at the time of the assignment or transfer of the note by B. to C., and which, if it were not originally due to A., had been at that time assigned to him ; or 2dly, he may set off a demand against C. which was in existence at the time of the assignment or transfer by C. to D., and which, if it were not originally due to A., had been at that time assigned to him ; or 3dly, he may set off the whole of a demand against D., the plaintiff, which was in existence at the time of the commencement of the suit, and then belonged to A., either as the original creditor or as the assignee thereof. But if the note had been transferred by B. to C. before it became due, and by C. to D. after it became due, then in a suit in the name of D. against A., no set-off could be made of a demand against B., but a set-off could only be made of a demand against C. or D., as above stated. So if the note had been assigned by both B. and C. before it became due, no set-off could be made, except of a demand against D.(p) Vid. also *Driggs v. Rockwell*, 11 Wen. 504, where it was held by the court of errors, that in an action upon a negotiable promissory note assigned after maturity, a set-off, to the amount of the plaintiff's debt, may be made of a demand existing against the assignor, provided it be such as might have been set off against the assignor while the note belonged to him ; or if the suit be in the name of a plaintiff who has no real interest in the contract upon which the suit is founded, so much of a demand existing against the party whom the plaintiff represents, or for whose benefit the action is brought, may be set off, as will satisfy the plaintiff's debt ; and such a right of set-off existed as well before as since the revised statutes.(q)

Though a note be transferred after it falls due, the maker is not entitled to set off a demand against the payee, if, at the time of the transfer, the payee has other demands against the maker to an amount sufficient to exhaust the demands sought to be set off.(r) And where the maker of two notes has a demand against the payee sufficient to extinguish one of them, and the payee transfers one of them after its maturity, the other being sufficient to meet the demand of the maker, and subsequently the second note is transferred also after its maturity ; *it seems*, the holder of the former note would be entitled to recover the whole amount of it.(s)

Where the defendant purchased a judgment against O., who then held, as payee, a promissory note of the defendant, and O. afterwards, and after the note was due, transferred the note to the plaintiff ; it was held,

(p) Vid. *Edw. Treat.* 3d ed. 61.
(q) 11 Wen. 504.

(r) 12 id. 356.
(s) Id.

that the defendant might set off the judgment in a suit brought by the plaintiff on the note.(t)

Where the plaintiff buys a negotiable note, after it falls due, he should give immediate notice to the maker, the same as if he had bought any other chose in action not negotiable ;(u) for being over due, it stands on precisely the same ground, and should the maker acquire any set-off against the payee, or other person transferring such dishonored note, before notice of the transfer to the maker, as if he should get hold of a note or other chose in action against the payee,(v) or have dealings with him, and thus acquire a right of set-off, he may avail himself thereof, either to defeat the plaintiff's recovery entirely, or diminish it according to the amount claimed as a set-off, unless he have previous notice that the plaintiff is the holder ; and this, even though such matter of set-off arose long after the plaintiff acquired both the legal and equitable interest in the note which he holds.(w)

Where, in a suit by the holder of a promissory note, the defendant pleaded a set-off, averring that the note was the property of the payee, that the plaintiff was a mere nominal party, and that the note was transferred to him for the purpose of depriving the defendant of his set-off ; and the plaintiff replied simply that the note was his property, and not the property of the payee, without traversing the corrupt transfer of the note ; it was held, that, by the pleadings, the plaintiff was to be considered as having admitted the corrupt transfer of the note, and the existence of the set-off.(x)

Where a note is transferred by the payee for a valuable consideration, *before maturity*, and an action is brought thereon in the name of the holder, for his own benefit, the defendant cannot set off a demand against the payee. Such a case is not within the statute of set-off.(y)

10. If the plaintiff be a trustee for any other, or if the suit be in the name of a plaintiff who has no real interest in the contract upon which the suit is founded, so much of a demand existing against those whom the plaintiff represents, or for whose benefit the action is brought, may be set off, as will satisfy the plaintiff's debt, if the same might have been set off in an action brought by those beneficially interested.

(t) 19 John. 342.

(u) Ante, 61, 2.

(v) Ante, 68, 4.

(w) *Benedict v. Dix*, in Sup. Court, Oct. term, 1817, M. S.

(x) 7 Wen. 223.

(y) 16 Wen. 659.

This provision of the statute was enacted to supply a defect in the old law, noticed by Mr. Justice Woodworth in the case of *Wheeler v. Raymond*, 5 Cowen, 231, 234 ; where, inasmuch as the case was not provided for by the former act in relation to set-offs, it was held, that in an action on a judgment, in the name of the judgment creditor, for the benefit of an assignee of the judgment, the defendant could not set off a debt due to him from the assignee.

It may be well to notice in this connexion, that if the plaintiff sue merely as the agent or trustee of a third person, and it was known to the defendant at the time when he entered into the contract, which is the subject of the suit, that the plaintiff acted in that capacity, he cannot set off a demand due to him from the plaintiff.(z) And it is not necessary that the defendant should have had express notice of the trust : an implied notice is sufficient ;(a) and so where the plaintiff is the mere agent or trustee of a third person, without any beneficial interest in the contract ;(b) as if an auctioneer sue me in his own name, for goods sold and delivered to me without receiving payment ; I may set off a debt due to me from his principal.(c) And where the plaintiff is merely nominal, having assigned the claim sued for to a third person ;(d) in these and the like cases, the defendant may set off a claim due to him from the principal *cestuy que trust*,(1) or assignee. And so, where a factor, dealing for a principal, but concealing the principal, delivers goods in his own name, the person contracting with him, has a right to consider him to all intents and purposes as the principal ; and though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor, in answer to the demand of the principal.(e) But if the purchaser knew that he was dealing with an agent, he cannot avail himself of a set-off against the agent in an action by the principal.(f) And so, where one partner delivers partnership property to a third person, who, knowing it to be partnership property, receives it in payment of his individual debt due from the partner delivering it to him, in an action by and in the name of all the partners, against such creditor of the individual partner, for the price of the goods, the debt of the one partner is not a defence or set off against all the partners.(g)

(z) 2 Caines, 299. 3 Cranch, 193.

(a) 12 John. 343.

(b) 7 Taunt. 243. 2 Cranch, 342.

(c) 7 Taunt. 243.

(d) 1 T. R. 621, 2. 1 Maule & Selw. 545. 2 Cranch, 342.

(1) The person beneficially interested.

(e) 7 T. R. 356, n. a. id. 355. Vid. ante, 78.

(f) 2 Caines' Cas. in Er. 341. 3 Cranch, 193. Vid. ante, 78.

(g) 16 John. 34. Vid. ante, 89, 90.

11. But if such an action as is mentioned and provided for in the last preceding subdivision be brought by the assignee of an insolvent, imprisoned, absent, concealed or absconding debtor, no set-off shall be allowed of any debt, unless in the cases provided in the fifth Chapter of the Second Part of the Revised Statutes.(h)

Those cases are contained in section 7, article 8, of title 1st of the fifth chapter, 1 R. S. 798, by which it is provided, that no set-off shall be allowed in any action brought by an assignee as above mentioned, for any debt, unless it was owing to the defendant before the first publication of the notice required in the first article, or before the appointment of trustees under the second article, or before the presenting the petition of the insolvent under the third, fifth and sixth articles, or before the publication of notice to creditors under the fourth article.(i)

And, where the defendant buys a note after it is due, this circumstance is such constructive notice to him of the insolvency of the maker, that he cannot set it off in an action brought in the name of the maker, who had become insolvent, by the assignees of his property in trust for his creditors;(j) for the note being over-due was held sufficient to put the defendant on inquiry relative to the maker's circumstances, and, therefore, equivalent to actual notice.(k)

To entitle a defendant to a set-off, he must plead or give notice of the same, specifying the nature of his claim, with reasonable certainty, at the time of joining issue on a question of fact upon the merits of the cause.(l)

This was the rule before the revised statutes; and in one case, so strictly was the defendant held to the pleading or giving notice, *at the time of joining issue*, that where he merely pleaded the general issue, to an action on a note and account for services, &c., and the cause was adjourned to a future day, and on the return day the defendant produced a receipt or written settlement of the plaintiff's account, which he exhibited and offered as a set-off, but which was objected to, on the ground that it had not been pleaded nor any notice of it given, and the claim was allowed as a set-off and judgment given for the defendant; the judgment was reversed by the supreme court on *certiorari*, although it appeared from the justice's return, that by the credit of the plaintiff's

(h) 1 R. S. 798, § 7.

(i) Vid. Edw. Treat. 3d ed. 61, 2.

(j) 1 John. Cas. 51. 2 Caines' Cas. in Er. 303. Vid. 2 John. 274.

(k) Id. 12 John. 343. Ante, 64.

(l) 2 R. S. 166, § 51.

book, there was a balance due to the defendant. In giving their opinion, the court say: "The defendant ought either to plead the set-off, or give notice of it at the joining of issue, and not keep it in reserve and secrecy until the trial has commenced; for this is calculated to surprise the plaintiff, and prevent him from being prepared to controvert the account or demand so offered as a set-off. Such conduct is calculated to work great injustice, and is contrary to the meaning of the act."^(m) This case was an extreme one, and the court gave the act a rigid construction. Indeed, it is doubtful whether the rule there established would now be adhered to, under the liberal construction which is given to the proceedings of justices' courts. For although the statute is imperative, that the plea shall be interposed or the notice given at the time of joining issue; yet it will be seen that in the case above cited, it appeared from the plaintiff's own book, that there was a balance due to the defendant; this, or even the receipt offered by the defendant, was, therefore, properly received as evidence of payment, although offered as a set-off; and this evidence of payment is competent under the general issue. Justice was done to the parties by the court below, and whenever this appears clearly, the court of common pleas or supreme court should not interfere with the judgment.

Before closing this head, we shall give the form of the plea and notice of set-off.

We insert the two following sections of the statute relating to pleadings and set-offs, because properly connected with the subject now under consideration. This will save us the necessity of noticing them when treating of judgments, in a subsequent chapter.

By the fifty-second section,⁽ⁿ⁾ it is provided that if the amount of the set-off duly established, be equal to the plaintiff's debt, judgment shall be entered for the defendant, with costs; if it be less than the plaintiff's debt, the plaintiff shall have judgment for the residue only, with costs. If it be more than the plaintiff's debt, and the balance found due to the defendant from the plaintiff in the action, be fifty dollars or under, judgment shall be rendered for the defendant, for the amount thereof, with costs; and execution shall be awarded as upon a judgment in a suit brought by him; but no such judgment shall be rendered against the plaintiff, when the contract, which is the subject of the suit, shall have been assigned before the commencement of such suit, nor for any balance due from any other person than the plaintiff in the action.

The fifty-third section,^(o) provides, that if the balance found due to

^(m) 10 John. 108, 9. Vid. also 12 id. 205.

⁽ⁿ⁾ 2 R. S. 166.
^(o) Id. 167.

the defendant exceed fifty dollars, the justice shall set off so much of the defendant's demand against the plaintiff's debt, as will be sufficient to satisfy it, if required to do so by the defendant, and shall render judgment for the defendant, for his costs ; but if the defendant shall not require such set-off, the justice shall enter judgment of discontinuance for the defendant, with costs ; and the defendant may thereafter sue for and recover his demand in any court having cognizance thereof.

The phraseology of these two sections is so plain as to need no comment. They point out with simplicity and directness the course which the justice is to pursue in the cases to which they apply. It should be observed, however, that our remarks, ante, 728, in regard to the effect upon the defendant of not setting off his demands at the first opportunity, do not apply to the case embraced within the last clause of the above fifty-third section. Thus, if A. commence an action on a promissory note against B., who proves a demand against A., which is the proper subject of set-off, sufficient to overbalance A.'s note to an amount exceeding fifty dollars, B. may, if he pleases, content himself with a simple judgment of discontinuance against A. ; and this submission of his set-off to the consideration of the justice and the judgment thereon, will not operate as a bar to his recovering the same in another action.

It is further provided by statute, (p) that if, upon the trial of the cause, it shall appear that the amount of the plaintiff's claim, together with the demands set off by the defendant, exceed four hundred dollars, judgment of discontinuance shall be rendered against the plaintiff, with costs.

The old act, (q) excluded from the jurisdiction of justices, matters of account where the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeded four hundred dollars ; and the defendant, to avail himself of that provision, might have pleaded that fact in abatement, and thus ousted the justice of his jurisdiction. (r) This presented a strange anomaly, and one with which the courts were frequently troubled ; for whether the accounts exceeded or fell short of four hundred dollars, was a matter that could only be ascertained at the trial. Hence the alteration effected by the above enactment, leaving the matter to be determined at the trial, and when ascertained, authorizing a judgment of discontinuance.

The plaintiff's claim and defendant's set-off, mentioned in the preceding section, extend to those demands only which are open and unliqui-

(p) 2 R. S. § 54.
(q) Laws of 1824, p. 280, § 1.

(r) Vid. 12 John. 205. 10 id. 110.

dated between the parties; where they have been settled, and a balance struck, that balance alone is the account between them.(s) Thus, where on the trial of a cause in the supreme court, the plaintiff proved a note of two hundred dollars against the defendant, who then proved a note of six hundred dollars against the plaintiff, and that when the latter was given the plaintiff agreed to destroy the former, but the defendant claimed nothing as due upon the latter; it was held, that neither of these notes could be considered accounts between the parties.(t) So, if the plaintiff on the trial, should prove a note for two hundred and fifty dollars, and the defendant should prove that he had paid on the note two hundred and twenty-five dollars, the justice might give judgment for the balance. But if the plaintiff should prove a note of two hundred and fifty dollars, and the defendant should prove a set-off to the amount of two hundred and twenty-five dollars, in such a case the justice should render a judgment of discontinuance.(u) The distinction is this: in the former case the plaintiff's demand is reduced by *payments* specifically made upon the note, leaving the sum unpaid the true balance due and which alone can be considered as the account between the parties within the principle of the well established rule above cited. The latter case stands upon a different ground. There the demands claimed as a set-off are not introduced in the character of *payments* specifically applied to the reduction of the plaintiff's claim; but are entirely different and independent demands, having no connexion with the plaintiff's claim, and upon which the defendant might sustain an action.

The statute further provides,(v) that in suits brought by executors and administrators, the defendant may set off demands existing against their testators or intestates, and belonging to the defendant at the time of their death, in the same manner as if the action had been brought by and in the name of the deceased.

But if the demand against the testator or intestate did not, at the time of his death, belong to the defendant, it cannot be set off. So, on the other hand, an executor or administrator cannot set off a demand purchased by him after the death of the testator or intestate, against a debt due by the estate to the person against whom he holds the demand so purchased.(w) But this last remark has no application to justices' courts, for actions against executors and administrators are expressly excluded from their jurisdiction.(x)

(s) 2 Cowen, 413.

(t) Id.

(u) 10 Wen. 555, 557, note.

(v) 2 R. S. 167, § 55. Vid. also 20 John. 137.

(w) 2 Paige, 402.

(x) 2 R. S. 158, 9, § 4.

Whenever a set-off is established in a suit brought by executors or administrators, the judgment shall be against them in their representative character, and shall be evidence of a debt established, to be paid in the course of administration; but execution shall not issue thereon, until directed by the surrogate who granted letters testamentary or of administration.(y)

This provision of the statute is new and important. Now, as before the revised statutes, the defendant is equally authorized and required to set off his claim against the testator or intestate; but the judgment, if in favor of the defendant, is not, as formerly, absolute against the plaintiff, and collectable out of his proper goods and chattels;(z) but is merely evidence of a debt established, payable in the course of administration, and upon which execution cannot issue till directed by the surrogate. We inadvertently laid down the law on this subject, ante, 544, as it existed previous to the recent revision of the statutes, and take this occasion, as the first convenient opportunity, for noticing and correcting the error.

It is further provided by statute,(a) that if a defendant neglect to plead or give notice of any set-off, which, according to the provisions of the statute, might have been allowed to him, on the trial of the cause, he shall be forever thereafter precluded from maintaining any action to recover the same, or any part thereof. And if the demand which might have been set off consisted of a negotiable note, or bill of exchange, no action shall be maintained thereon, by any person who may derive title thereto, from or through the defendant.

The last clause of this section goes farther than the old statute.(b) It not only bars a right of action *in the defendant's name* upon claims which he neglected to set off, but extends the prohibition to *subsequent holders* of negotiable paper deriving title from or through the defendant.

We have already spent some time upon the subjects embraced within the provisions of the above section, in our remarks upon the plea of a former action, in which the plaintiff ought, but neglected to set off his demand,(c) and shall not repeat the matter thus already brought into view. We therefore proceed to notice the cases to which the above section is declared not to extend, that is, to cases where, although the defendant has neglected to set off his claim; or although his set-off may have been submitted to the consideration of the justice, yet, notwithstanding, he may maintain an action for the recovery of the same. It should be remarked,

(y) 2 R. S. 167, § 56. Vid. also id.
29, § 32.
(z) 10 John. 366. Vid. 1 John. Cas.
228. Ante, 544.

(a) 2 R. S. 167, § 57.
(b) Laws of 1824, p. 282, § 8.
(c) Ante, 729, 730.

however, before we leave this subject, that the rule which requires the defendant to set off his demands, at the first opportunity, will not compel him to set off a claim which has accrued or been purchased by him subsequent to the commencement of the suit against him. Indeed, such a demand is not the proper subject of set-off,(d) and consequently a failure to set off would be no bar to a subsequent action upon it.

It is declared by statute,(e) that the last preceding section shall not extend to the following cases:

1. When the set-off shall be fifty dollars more than the judgment which the plaintiff shall have recovered:

2. Where the set-off consisted of a judgment in favor of the defendant, or belonging to him, rendered before the commencement of the suit in which the same might have been set off:(1)

3. Where a set-off shall have been claimed by him, and a balance exceeding fifty dollars shall have been found in his favor, the defendant may maintain an action for such part of his demand as was not allowed to him as a set-off:

4. Where the suit was commenced against the defendant by attachment, and he did not personally appear in such suit:

5. Claims for unliquidated damages, which could not be set off, on the trial of the cause, according to the preceding provisions :(f)

6. Claims in suit in any other court at the time of the commencement of the suit before the justice.

Before giving the form in which the defendant's set-off is to be introduced, we will proceed to notice some points in regard to the law of set-off, not properly reducible to any of the foregoing divisions.

The defendant may set off a debt due to him from the plaintiff, although he agreed to pay the plaintiff's demand in ready money.(g) So, although he has positively agreed to account or pay over to the plaintiff moneys which the plaintiff has authorized him to receive as his agent.(h)

Where a promissory note is given for a specific sum, evidence that *at the time* of giving the note, it was agreed between the parties that an account which the *maker* held against the *payee* should be deducted from

(1) But where the defendant obtained such judgment against the plaintiff on an attachment, it was held not a proper subject of set-off, while the goods attached remained unsold; for the presumption would be, that the goods are sufficient to satisfy the judgment, and it would be considered satisfied until the contrary appeared by an actual sale. 13 John. 517. And the presumption would be the same in regard to a judgment upon which execution has been issued and not returned. Vid. 6 Wen. 244.

(d) Vid. ante, 737.

(e) 2 R. S. 167, § 58.

(f) Vid. ante, 736, 737.

(g) 1 East, 375.

(h) 15 Wen. 51.

the note, is not admissible. An agreement, however, made *after* the giving of the note, that a debt contemplated to be contracted by the payee with a third person should be allowed in payment of the note, is a valid agreement, and the debt, when contracted, may be shown in *payment* of the note under the general issue. But such debt cannot be allowed as a *set-off*.(i)

A party holding a joint and several note against two makers, is not bound to set off the same in an action against him by one.(j.)

A debt, barred by the statute of limitations, cannot be set off; and the plaintiff may make the objection at the trial, where the set-off is introduced by way of notice;(k) but the defendant may answer the objection, by showing an acknowledgment of the debt, or a promise to pay it within six years, the same as in an original action, even though nothing be said of such acknowledgment or new promise in his notice.(l)

We adverted, ante, 728, 729, to the doctrine in regard to the plea in bar, that the plaintiff had once set off his demand in a former suit; but as the subject there discussed is of great practical importance and questions are arising under it almost daily in a justice's court, we hope to be excused for noticing in this place the case of *Wilder v. Case*,(m) in addition to the authorities before cited. The case contains a full collection of authorities, and much useful doctrine in regard to various subjects discussed under this head, and for that reason we venture to cite it at large.

IN SUPREME COURT—WILDER vs. CASE and others.

Error from the Orleans common pleas. Case and two other persons, in *March*, 1833, commenced a suit in a justice's court against Wilder, and declared for breach of a *special contract* entered into between the parties, whereby Case and his associates agreed to clear thirty acres of land for Wilder, and enclose the same in fence; and Wilder, on his part, agreed to give them a yoke of oxen, of the value of \$70, and to allow them to raise a crop of wheat on the premises cleared, and also to give them further privileges. The plaintiffs averred that they were prevented by the defendant from putting in the crop, and also alleged that the defendant broke the agreement in various other particulars. The defendant pleaded the general issue, and also a *former suit* in bar of the plaintiffs' recovery. The justice rendered judgment in favor of the plaintiffs for \$33,50, and the defendant *appealed* to the Orleans common

(i) 17 Wen. 190.
(j) 14 id. 161.
(k) Bull. N. P. 180.

(l) 17 John. 330.
(m) 16 Wen. 583.

pleas. On the trial in that court, after the plaintiffs had established their right to recover, the defendant proved that in *February*, 1833, he commenced a suit in a justice's court against the now plaintiffs, and declared against them, upon the same contract, for not clearing the land; to which declaration the now plaintiffs pleaded the general issue, accompanied with a notice, that, on the trial, they would prove performance on their part, and that the now defendant had not performed on his part, but had violated the agreement in all respects. On the trial of that cause, the now plaintiffs offered to prove, by way of *set-off*, the damage sustained by them in not being permitted to sow the wheat: which evidence being objected to, the justice ruled that the evidence was inadmissible to prove a *set off*, but that it might be given by way of *defence* to the action. Testimony was accordingly introduced by the now plaintiffs, to prove that the now defendant prevented them from sowing the wheat, and the evidence was submitted to the jury who tried that cause, who gave a verdict in favor of the now defendant for \$15, upon which judgment was rendered. On this evidence being given, the counsel for the defendant in the common pleas insisted, that the *former suit* was a bar to a recovery in the suit then on trial. The court charged the jury, that if they should find that there had been a former trial, in which the subject matter of this suit was litigated, *or should have been litigated*, such former trial was a bar to a recovery. The defendant excepted to the charge, and the jury found a verdict in favor of the plaintiffs for \$75, upon which judgment was rendered. The defendant sued out a writ of error, and one of the *points* insisted on, in support of it, was, that the common pleas had submitted to the jury the question of *law* as well as of *fact* in relation to to the former trial.

By the Court, COWEN, J. I am satisfied, on the whole, that the introduction of the matter, by which the action in the common pleas was sought to be sustained as a *defence* in the suit before the justice, should have been put to the jury as a bar.

Admitting that it was not available as a *set-off*, because the claim was unliquidated, 2 R. S. 234, § 50, sub. 3; *id.* 236, § 58, sub. 5;(1) or, if proper, that its exclusion on the objection of Wilder would have avoided the objection of *omission* to set-off, *Phinney v. Earle*, 9 John. 352, had the then defendants stopped there; yet it is well settled, that where a matter is improper by way of defence in a justice's court, (for example, by way of set off,) if a party will introduce it, and he goes into its investigation

(1) *Vid.* pp. 165, 168, 2d ed.

with the view to make it available, and it passes and is submitted to the justice or a jury, it cannot be heard again. *M'Lean v. Hugarin*, 13 John. 184. *Skelding v. Whitney*, 3 Wen. 154, 157, and cases cited by Marcy, J. at the latter page. *Curtis v. Groat*, 6 John. 168. But *M'Guinity v. Herrick*, 5 Wen. 245, per Savage, C. J. seems contra ; no cases, however, were cited by the chief justice, and the point was not involved in the case. The jury, on the trial in which Wilder was plaintiff, either allowed or disallowed it as a defence ; they allowed the whole or a part. Take the latter alternative. It has been again and again held, that you cannot split an entire claim into several parts and have more than one action. The same principle applies here. The defendants below could not divide their claim for damages and take a part of it, by way of *recoupment*, in the justice's court, and then come for the whole or any part of the claim to the common pleas. I understand, by the decision which received the evidence, that it was to go as a defence in whole or in part ; as a bar, or in mitigation of damages.

The only way in which the plaintiffs below could save their right to a subsequent suit, was by stopping short the moment that the qualified admission of their evidence was announced by the decision of the justice. Instead of that, they proceeded to give in evidence, and argued to the jury, the identical matter which they afterwards sued upon before another magistrate and set up on the appeal in the common pleas.

The rule is strict and technical, and may operate with severity in this instance ; looking at the amount of the recovery and the other evidence, I fear that it does. So does, many times, the statute of limitations ; but the courts and the community must maintain both. Excessive litigation is an evil, and the door must be shut against it on a single trial in the one case, or the lapse of six years in the other. All the law will permit by way of opening the judgment or decree of a court of competent jurisdiction, is a review of its decision for error, on appeal, or a proceeding in nature of an appeal, by certiorari or writ of error. If the justice erred, there was a direct remedy in that way ; but while the verdict and judgment before him stood unreversed, it concluded the parties as firmly as if the matter had been passed upon by the highest court of judicature in the state.

The judgment of the common pleas must be reversed.

OF THE FORM IN WHICH THE SET-OFF IS TO BE INTRODUCED.

This may be by plea or notice, at the joining of issue.⁽ⁿ⁾ The most usual course in practice for the defendant to introduce his set-off, is by way of notice with the general issue; though cases frequently occur where it is obviously preferable to plead it specially. For instance, suppose the claim sought to be interposed as a set-off, arose while the plaintiff was a minor; or is barred by the statute of limitations; in either case it would be well to plead the same specially, thus calling upon the plaintiff for his replication, from which the defendant may see upon what the plaintiff relies to defeat his claim. In this way, the matters at issue between the parties may oftentimes be reduced to a single point. As in the case first stated, suppose the plaintiff replies, that the defendant's claim arose against the plaintiff while he was an infant under the age of twenty-one years; to this the defendant may rejoin by a simple denial of the replication, or he may rejoin that the plaintiff has promised to pay since attaining to full age, or that the claim is for necessaries furnished to the plaintiff while an infant, which, if the plaintiff deny in his rebutter, the issue between the parties, so far as the set-off is concerned, is reduced to one single point of inquiry. By this course, much time and labor would be oftentimes saved to justices and parties; and although either party might avail himself of the above matters under a notice, the same as though specially pleaded, yet the latter mode of introducing a set-off has the advantage of apprising both parties, distinctly, at the joining of issue, what they are to meet from their adversary, thus enabling them to prepare for trial much more advantageously than if they were left in the dark as to the kind of proof they were to meet at the trial.

The notice of set-off should, in point of form, be almost as certain as a declaration;^(o) and, as a set-off is but a substitute for a cross action, which it essentially resembles, and may and usually does contain demands in general terms, like the common counts in a declaration,^(p) the plaintiff may, ascertain the sums claimed, with more certainty, by calling on the defendant for the particulars of his set-off in the manner we shall presently notice.

⁽ⁿ⁾ 2 R. S. 166, § 51. Vid. ante, 744.

^(o) Bull. N. P. 179.

^(p) Ante, 632 to 637.

PLEA OF SET-OFF.

Richard Roe } (1st, plead the general issue adapted to the action, as
 ads. }
James Jackson. } directed, ante, 700, 701.)

And for a further plea, the said D. says, that the said P. ought not to have and maintain his action aforesaid thereof, against the said D., because he says, that the said P., (or, *where the plaintiff is a mere trustee for another, or has no real interest in the contract upon which the suit is founded,*(q) then say, "That John Smith, for whose benefit this defendant avers this action is brought in the name of the said P., and which said P. has no real interest in the contract upon which this suit is founded,") before and at the time of the commencement of this suit, to wit, on, &c. at, &c. was and still is indebted to the said D. in the sum of one hundred dollars, for the work, labor and services of the said D., before then done for the said P., (or, *the said John Smith,*) and for divers materials and other necessary things used and employed in and about the same; and for divers goods, wares and merchandise, before then bargained and sold, and sold and delivered to the said P. (or, *the said John Smith,*) by the said D., and for money before then lent by the said D. to the said P., (or, *the said John Smith,*) and for other money before then paid, laid out and expended by the said D. to and for the use of the said P., (or, *the said John Smith,*) all at his request, and for the balance of divers accounts between the said parties, (or, *between the said D. and the said John Smith,*) before then found due and in arrear to the said D. from the said P., (or, *the said John Smith,*) on an accounting by and between them; and for other money, before then had and received by the said P., (or, *the said John Smith,*) to the use of the said D., &c. (and so you may state any claim which is the proper subject of set-off, conforming, substantially, to the mode usually adopted in declaring, provided you were a plaintiff instead of a defendant :) which said sum of money, so due and owing from the said P., (or, *from the said John Smith,*) exceeds the damages sustained by the said P., (or, *by the said John Smith,*) by reason of the non-performance by him, the said D., of the several above supposed promises and undertakings, (if the action be *in assumpsit,*) in the said declaration mentioned; and out of which said sum of money so due and owing to the said D., he the said D. is ready and willing, and hereby offers to set off and allow to the said P., (or, *to the said John Smith,*) the full amount of the damages sustained by him as

(q) 2 R. S. 166, § 50, sub. 10. Ante, 792.

aforesaid, according to the form of the statute in such case made and provided, and this he is ready to verify. Wherefore he prays judgment if the said P. ought to have or maintain his action aforesaid thereof against him; and he also prays judgment for the balance due from the said P., to him the said D. (*The last clause is to be omitted where the plaintiff sues for another's benefit, as above mentioned.*)

The notice of set-off may be in the following form :

NOTICE OF SET-OFF.

Richard Roe }
 ads. } To the plaintiff in this cause.
 James Jackson. }

Take notice, that the said D. will, on the trial of this cause, give in evidence and insist, that before and at the time of the commencement thereof, to wit, on, &c. at, &c. the said P. was and still is indebted to the said D., in the sum of one hundred dollars, for the work, labor and services of the said D. before then done for the said P., and for divers materials and other necessary things used and employed in and about the same; and for divers goods, wares and merchandize, before then bargained and sold, and sold and delivered to the said P., by the said D., and for money before then lent by the said D. to the said P., and for other money before then paid, laid out and expended by the said D., to and for the use of the said P., all at his request, and for the balance of divers accounts, between the said parties, before then found due and in arrear to the said D. from the said P. on an accounting by and between them; and for other money before then had and received by the said P. to the use of the said D., &c. Which several claims the said D. will set off and allow to the said P. against any claim or claims to be proved by him on the said trial; and claim judgment for such balance as shall then appear to be due to the said D. Dated the 1st day of September, 1840.

The notice is to be varied as directed in the *plea* of set-off given above, where the action is brought by the plaintiff as trustee for another, or where the nominal plaintiff has no real interest in the contract upon which the suit is founded. And the same remark applies as to the character of the demands set off. Indeed the plea and notice are in fact the same thing in substance—the difference between them is mere matter of form.

The rules, as to what may be given in evidence under the *cross counts* included in the notice of set-off, are the same as relate to a declaration.

The above forms of *plea* and *notice* of set-off, contain all that can be required by the strictest rules of special pleading, and such as may be insisted on by the plaintiff, within the principles of our remarks, ante, 551, 552 and 569, note (1.) However, if the plaintiff do not object at the time of joining issue, almost any thing will answer for a notice of set-off. Thus, in one case,(r) the supreme court held that it was sufficient, on the joining of an issue in a justice's court, for a defendant to say that he pleaded the general issue, and gave notice of set-off, unless the plaintiff at the time objected to the defence for want of certainty, or required a specification of the nature of the defendant's claim; and if he did not so object or require such specification, he could not subsequently, on the trial of the cause, object to evidence of set-off on the ground that the nature of the claim had not been specified, at the time of joining the issue, with sufficient certainty. And in another case,(s) it was held that the notice need not expressly claim a balance in the defendant's favor in order to warrant his recovering one. It is enough that it set forth his demand in the usual form.

A question arises, under the provision of the statute authorizing a defendant to set off his demands,(t) as to what degree of particularity is required in the plea or notice. The phraseology of the section applicable to justice's courts, is different from that which relates to courts of record.(u) According to the latter, "to entitle a defendant to a set-off, he must plead or give notice of the same." In a justice's court, the defendant must not only plead or give notice of the same, but he must *specify the nature of his claim with reasonable certainty*.(v) The language is general as applied to the pleadings in courts of record, because they have the power to require the production of bills of particulars from either party, which power, it seems, is not possessed by justices' courts, except in the single instance pointed out by the statute,(w) to which we shall hereafter refer when speaking of adjournments.(x) Now, under the above provision, is any thing more than a general plea or notice of set-off, the forms of which we have just given, required? Do not those forms specify the nature of the defendant's claim with *reasonable certainty*? We think they do; for it is to be observed, that the statute does not require that the *items* or *particular charges* should be set forth, but simply the *nature* of the claim. Suppose you sue me on a promissory note, and I am desirous of reducing the amount of your claim, by proof

(r) 18 Wen. 403.

(s) 4 Cowan, 21.

(t) 2 R. S. 166, § 51. Vid. ante, 744.

(u) 2 R. S. 279, § 26.

(v) Id. 166, § 51.

(w) Id. 171, § 79.

(x) Vid. 11 Wen. 554.

of having worked for you a certain number of days. If I say in my plea or notice generally, that I claim a given sum of you "for work, labor and services," is not this a specification of the *nature* of my claim? Clearly so. Under it, I could not go for money paid, money had and received, &c., because such demands are entirely of a *different nature*. Such a specification is moreover *reasonably certain*. You cannot be misled by it, or surprized at the trial by the introduction of testimony to support the allegation. True, it does not possess all the certainty of a merchant's account or of a formal bill of particulars; but this is not required. I am merely to specify my claim with *reasonable* certainty. The above views are sustained, as it seems to me, by the case of *Harrington v. Ensign*, 11 Wen. 554, and I therefore conclude that the above general form of plea and notice is sufficient. In the language of the court, in that case, the defendants' claim "must be so specific that the plaintiff shall not be surprized upon the trial by any demand *not embraced within the plea or notice*;" and therefore, where a defendant gave notice of set-off for goods, wares and merchandize, and for money had and received, and stated, as a condition upon which an adjournment should be granted, that his demand was for grain, for hides, and for board, amounting to fifty dollars; and subsequently, on the day of the adjournment, informed the plaintiff's attorney that he had also an account for a stove sold, which last item the justice refused on the trial to consider; the supreme court held that the justice erred, and the judgment rendered by him for the plaintiff was reversed upon the ground, if I correctly understand the opinion of Savage, C. J., that the charge for the stove was embraced within the general language of the notice. That case further holds, that, in no case, is a defendant bound to furnish a *formal bill of particulars*.

Where the defendant claimed but five dollars by way of set off, and the jury gave a verdict of fifteen dollars in his favor, it was held to be merely an error of form, and the judgment was, notwithstanding, affirmed for the whole fifteen dollars, with costs.(y) If the plaintiff do not appear, or if, after appearance, he submit to a non-suit, or go after a witness during the trial, but does not appear again, the justice has no right to allow the defendant's set off against him.(z)

(y) 3 John. 433.

(z) 13 id. 469, 470.

OF THE PLEA OF THE STATUTE OF LIMITATIONS.

Form.

That the several supposed causes of action, in the said P.'s declaration mentioned, did not, nor did either of them, accrue to the said P. at any time within six years next before the commencement of this suit, in manner and form as the said P. hath, in declaring, complained. Vid. ante, 580.

This plea applies to all actions cognizable in a justice's court, (a) with very few exceptions. These exceptions are mostly comprised in 1. An action on a judgment or decree of any court of record of the United States, or of this or some other state; 2. The action of covenant; 3. Debt on a specialty, or an indenture for the payment of rent; (b) 4. Actions against sheriffs or other officers, for the escape of persons imprisoned on civil process, which actions are limited to one year; (c) 5. Actions against sheriffs and coroners, upon any liability resulting from the commission or omission of any act in their official capacity, except for escapes, which last actions are limited to three years; 6. Actions upon statutes. (d) (1)

(1) The language of the statute is as follows: we give it verbatim, although it will be seen that in many particulars it has no application to justice's courts. This will serve to elucidate the general language of the text. 2 R. S. 224.

§ 18. The following actions shall be commenced within six years next after the cause of such action accrued, and not after: 1. All actions of debt founded upon any contract, obligation or liability, not under seal, excepting such as are brought upon the judgment or decree of some court of record of the United States, or of this or some other state; 2. All actions upon judgments rendered in any court not being a court of record; 3. All actions of debt for arrearages of rent not reserved by some instrument under seal; 4. All actions of account, assumpsit, or on the case, founded on any contract or liability, express or implied; 5. All actions for trespass upon land; 6. All actions for taking, detaining or injuring any goods or chattels, including actions of replevin; 7. All special actions on the case for criminal conversation, for libels, or for any other injury to the persons or rights of any, except such as are specified in the two next sections.

§ 19. The following actions shall be commenced within four years after the cause action accrued, and not after: 1. All actions for assault and battery; 2. All actions for false imprisonment.

§ 20. The following actions shall be commenced within two years after the cause of action accrued, and not after: 1. Actions for words spoken, slandering the character or title of any person; 2. Actions for words spoken, whereby special damages are sustained.

§ 21. All actions against sheriffs or other officers, for the escape of persons imprisoned on civil process, shall be commenced within one year from the time of such escape, and not after.

§ 22. All actions against sheriffs and coroners, upon any liability incurred by them, by the doing any act in their official capacity, or by the omission of any official duty, except for escapes, shall be brought within three years after the cause of action shall have accrued, and not after that period.

(a) Vid. 2 R. S. 224, § 18.

(c) Id. § 21.

(b) Id. sub. 3. 16 John. 210. 14 id.

(d) Id. 225, § 29, 30, 31.

479, 80.

The statute applies to actions upon judgments rendered in any court not being a court of record; and hence, actions upon justices' judgments must be brought within six years; and so of an action on a foreign judgment. (e) But the statute is not a bar to an action of debt upon an award under seal, although the submission be not under seal. Such an award is in the nature of a judgment and will be regarded as a specialty, in reference to the statute. (f)

Where a note was endorsed by the holders to a bank for collection, whose notary negligently omitted to charge a prior endorser by notice, and the bank was sued by their endorsers for neglect and compelled to pay damages; in an action of *assumpsit* against the notary, it was held, that the cause of action arose immediately on the omission, and the bank, not having sued till more than six years after, were barred by the statute of limitations; and this, though the former suit, recovery thereon and payment by the bank, were all within six years of the suit against the notary. (g) And so, when a surety, an accommodation endorser, pays part of a judgment obtained against him, and gives his note for the balance, which is accepted by the plaintiff in satisfaction of the judgment, and in full of his claim, the cause of action of such surety against his principal to recover as for money paid, is perfect, and the statute of limitations begins to run. (h)

The statute begins to run against a note payable on demand, from the day of the date of the note; but it is otherwise as to one payable at a given day *after* demand; in the latter case, it commences running only from the time of the demand. (i)

An action against an attorney, for moneys collected by him, must be

In regard to actions upon statutes it is provided, 2 R. S. 225,

§ 29. All actions upon any statute made, or to be made, for any forfeiture or penalty, to the people of this state, shall be commenced within two years after the offence shall have been committed, and not after.

§ 30. All actions upon any statute made, or to be made, for any forfeiture or penalty, given in whole or in part to any person who will prosecute for the same, shall be commenced within one year after the offence shall have been committed, and not after; and in case such action be not commenced within that time, by any private citizen, then the same shall be commenced within two years after that year ended, in behalf of the people of this state, by the attorney general, or the district attorney of the county where the offence was committed, and not after.

§ 31. All actions upon any statute made, or to be made, for any forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved, or to such party and the people of this state, shall be commenced within three years after the offence committed, or the cause of action accrued, and not after.

(e) Doug. 1, and vid. 14 John. 478,
per Van Ness, J. Vid. 17 Wen. 329.

(f) 7 Wen. 241.

(g) 6 Cowen, 238.

(h) 10 Wen. 498.

(i) 13 id. 267.

brought within six years after the money is received by him ; and the fact that a demand was not made within six years before suit brought, will not save the statute.(j)

The statute limiting actions against sheriffs and coroners to three years, does not extend to acts done *by color of their office*.(k)

The statute provides,(l) that in all actions of debt, account or assumpsit, brought to recover any balance due upon a mutual, open and current account, the cause of action shall be deemed to have accrued from the time of the last item proved in such account.

This section was enacted instead of the expression in the old act,(m) "other than actions which concern the trade of merchandize between merchant and merchant, their factors or servants." That expression had given occasion to numerous decisions, some of them contradictory, which left the law for many years quite uncertain. It was, however, finally decided, 1. That the exception in the former act, which we have quoted above, extended to all persons, whether merchants or others ;(n) 2. That where all the accounts had ceased for six years, the demand was barred ; and consequently, that when there was an open, current, *mutual* account, within six years, the whole account might be recovered ;(o) 3. That the limitation of the statute applied as well to accounts between merchants, as others, notwithstanding the exception.(p) It was, therefore, thought better, by the legislature, to express the actual state of the law, in the language of the courts, than to retain a phraseology, which was incorrect in its terms, and which led to misconstruction.(q)

One item of an account within six years before suit brought will not draw after it items beyond six years, so as to protect them from the statute, unless there have been *mutual accounts* and *reciprocal demands* between the parties.(r) Where, from the commencement to the termination of an account, charges have been made at least as often as once in six years, and the last item is within six years anterior to the commencement of a suit, the whole of the account is to be allowed, notwithstanding the statute is interposed as a bar. Accordingly, where a defendant was sued in 1829, on a demand accruing in 1826, and he proved an account against the plaintiff by way of set-off, consisting of items accruing, some in 1826, others in 1822, and others in 1818 ; *it was held*, that the items accruing in 1826 drew after them the previous charges, and saved

(j) 15 Wen. 302.

(k) 19 id. 283.

(l) 2 R. S. 224, § 23.

(m) Laws of 1813, p. 186, § 5.

(n) 20 John. 583.

(o) 2 John. 201. 5 John. Ch. R. 522.
2 Saund. 127. 6 Cowen, 695.

(p) 18 Ves. 286.

(q) Vid. 3 R. S. 703, in appendix.

(r) 7 Wen. 322. Vid. 20 id. 72.

them from the operation of the statute.(s) The fact that the transactions to which the charges relate are of separate and distinct natures does not affect the principle.(t) But the payment of a running account down to a particular period, and the taking of a receipt for such payment, is not such a transaction as will bring a case within the exception of the statute as to mutual accounts, so that an item within six years will draw after it items beyond that time, extinguished by such payment.(u)

In an action of trover, the statute commences running at the time of the conversion;(v) and where goods were taken on a void execution, it was held that the statute commenced to operate from the original taking;(w) and in an action on the case for a deceit, the cause of action accrues at the time of the deceit, and the statute operates from that time, although the plaintiff did not discover the fraud until within six years prior to the commencement of the suit.(x) But with regard to actions on the case, where the injury is consequential, and not immediate, the statute runs, not on the committing of the act, but on the injury that follows, for the act itself is not actionable, till the consequences have made it so;(y) though where the gist of the action is the act itself of the defendant which occasioned the damage, and not the mere consequential injury flowing from the act, the rule is otherwise. Thus, in an action on the case against an attorney, for negligence, where the declaration stated that the plaintiff retained him to see if a certain security were good, and that he accepted the retainer and neglected his duty, and represented the security to be good, and that the plaintiff advanced his money, the security being in fact bad, by means of which the plaintiff lost the interest, the gist of the action was held to be the negligence, and the statute of limitations was considered as running from the time of the negligence, and not from the time of the loss of the interest.(z) Vid. Grah. Prac. 2d ed. 102.

It is further provided by statute,(a) that if any person entitled to bring any action which would be barred by lapse of time as above mentioned, (excepting actions against sheriffs or other officers for escapes,) shall, at the time the cause of action accrued, be, either, within the age

(s) 9 Wen. 126. Vid. also 1 Barn. & Adol. 15 Moore & Payne, 187.

(t) 9 Wen. 126.

(u) 15 Wen. 554.

(v) 7 Mod. 99.

(w) 3 John. 523.

(x) 20 John. 45, 48, 278. 3 Murph. 115.

(y) Till. Ballantine on Lim. 96, and in notes. 1 Car. & Payne, 541. 1 Marsh. 429.

(z) 2 Car. & Payne. 238. 5 Barn. & Cress. 259, S. C. 5 Dowl. & Ryl. 14.

(a) 2 R. S. 224, § 24.

of twenty-one years ; or insane ; or imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than for his natural life ; or, a married woman ; such person shall be at liberty to bring such actions within the respective times limited by the statute, after such disability removed.(1)

It is further provided,(b) that none of the provisions of the statute shall apply to suits brought to enforce payment on bills, notes or other evidences of debt, issued by monied corporations.

And further,(c) that if any person entitled to bring any action above specified, shall die before the expiration of the time limited for the commencement of such suit, if such cause of action shall survive to his representatives, his executor or administrator may, after the expiration of such time, and within one year after such death, commence such action ; but not after that period. Nor shall the time which shall have elapsed between the death of any person, and the granting of letters testamentary, or of administration on his estate, not exceeding six months, or the period of six months after the granting of such letters, be deemed any part of the time limited for the commencement of actions, by executors or administrators.(d)

The statute further provides,(e) that if at the time when any cause of action above mentioned, shall accrue against any person, he shall be out of this state, such action may be commenced within the terms limited, after the return of such person into this state ; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

The above limitations for the commencement of actions apply to the same actions when brought in the name of the people of this state, or in the name of any public officer, or otherwise, for the benefit of the people, in the same manner as to actions brought by citizens.(f)

In regard to the disabilities contemplated by the statute, that is, where the person entitled to bring the action is an infant, insane, imprisoned, in execution, or a married woman, they must exist at the time the cause of action accrues, for if the statute once begin to run, any subsequent disability of the kind above mentioned will not excuse the want of a prosecution.(g)

(1) To entitle a party to the benefit of these provisos, they must be specially pleaded. 7 Wen. 354.

(b) 2 R. S. 225, § 25.

(c) Id. § 26.

(d) 2 R. S. 266, § 9.

(e) Id. 224, § 27.

(f) Id. § 28.

(g) 1 John. 165.

As to what constitutes a return of a defendant into the state, within the meaning of the 27th section above quoted, it has been held, that where a debt is contracted abroad, by a person residing out of the state, and the debtor afterwards comes within the state, publicly, and so that the creditor might, with ordinary diligence and due means, arrest him, it is a return.^(h) But a temporary absence of a debtor, from the state, after the cause of action accrued, will not take the case out of the statute.⁽ⁱ⁾

Whenever the commencement of any suit shall be prevented, by reason of any privilege of any member of either house of the legislature of this state, or of any member of either house of the congress of the United States, the time during which the same shall have been so prevented, shall not be deemed any portion of the time limited for the commencement of any suit for the recovery of any debt, demand, or damages only.^(j)

The disabilities which we have thus far noticed, are peculiar to actions for the recovery of a debt or demand, or for damages only. Those, which we are now about to mention, apply as well to actions of that kind, as to those for penalties and forfeitures,^(k) and are thus defined. Whenever any person shall be disabled to prosecute, in the courts of this state, by reason of his being an alien subject or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods limited by statute, for the making of any entry, or the commencement of any action.^(l) If any action shall have been commenced, within the times respectively prescribed by the statute, and judgment be given therein for the plaintiff, and the same be arrested, or reversed on error, the plaintiff may commence a new action, from time to time within one year after such judgment arrested or reversed; and if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may, in like manner, commence a new action within the time herein allowed to such plaintiff.^(m) If any action shall have been commenced within the times respectively prescribed by the statute, and the defendant in such suit die before judgment, and if the right of action be such as survive against the representatives of the defendant, the plaintiff may commence a new action against the heirs, executors or administrators of such defendant, as the case may require, within one year after such death; or if no executors or administrators be appointed within that time, then, within one year after letters testamentary, or of administration, shall have been

(h) 10 John. 464. 3 Mass. R. 271.
Vid. 7 id. 516, 518.

(i) 3 Bibb, 269. Vid. 4 Barn. & Cress.
626.

(j) 2 R. S. 227. § 37.

(k) Vid. ante, 758, 9, note (1).

(l) 2 R. S. 226, § 32.

(m) Id. § 33.

granted to them.(n) When an action, commenced within the time prescribed by law, shall abate by reason of the death of the plaintiff, if the right of action survive to his representatives, his executor or administrator may, within one year after such death, commence a new action, if the cause of action would otherwise survive; and if any action, so commenced, by an executor or administrator, shall abate by the death of the plaintiff, a new action may be commenced by the administrator of the same estate, at any time within one year after such abatement.(o) None of these disabilities, however, prevent the statute from running, or suspend its operation, unless they exist at the time the right of action accrued;(p) and where two or more disabilities exist, at the time the right of action accrued, the statute does not attach, until they are all removed.(q)

HOW THE STATUTE MAY BE AVOIDED.

The statute of limitations does not destroy the debt; it only bars the remedy; and this, upon the supposition, after a certain time, that the debt has been paid. It may therefore be revived by a subsequent promise within six years, the original consideration being sufficient to sustain the promise; or by a subsequent acknowledgment of the debt, from which a promise will be implied.(r) The books of reports are filled with cases giving construction to acknowledgments by defendants, some of which go far towards depriving them of the benefits of the statute; and many, especially the older ones, stand in direct hostility to others more recently decided. The decisions of our own courts are, however, quite uniform, and it may now be said, that with us, the law on this vexatious and troublesome subject, is at length reduced to certainty. Mr. Graham, in his excellent treatise on practice,(s) has given us an able review of the latest authorities on this head, to which nothing more than a general reference can here be made. We shall briefly notice those cases, with some others not commented upon by him, and close this part of the subject with extracts from the opinion of C. J. Savage in *Allen v. Webster*,(t) a case decided since the publication of Mr. Graham's work.

In *Purdy v. Austin*,(u) the supreme court held, that the acknowledgment of a defendant, to take a case out of the operation of the statute, must be an *unequivocal* and *positive recognition* of a subsisting claim in favor of the plaintiff; it must be an admission of a *previsus* subsisting debt which he is *liable* and *willing* to pay; and must not be accompanied

(n) 2 R. S. 226, § 34. Vid. 13 Wen. 267.

(o) 2 R. S. 225, § 35.

(p) Id. 227, § 41.

(q) Id. § 42.

(r) Vid. *Grah. Prac.* 2d ed. 107, 8, and the cases there cited.

(s) Id. 108, 9.

(t) 15 Wen. 284.

(u) 8 id. 187.

by circumstances repelling the presumption of a promise to pay the debt ; and therefore where a defendant, on an account being presented to him, after looking at it, threw it down and said, " I owe him no such money," or asked, " I owe him so much money as that ? Why did he not present the bill himself ?" and added that he never had a bill from him, that he would not settle with any one but him, that he did not owe him any thing, or any thing worth mentioning ; that he had paid him a great deal of money, a horse and the use of a house, and appeared much surprised, and signified that he had paid the plaintiff all his work amounted to ; (the account was for work,) *It was held*, that the declarations of the defendant, instead of amounting to a recognition of a subsisting demand, were a denial of of the pretended claim of the plaintiff. Vid. the opinion of Marcy, J. in this case, 3 Wen. 188 to 192, and the cases cited and commented upon by him. Vid. also 15 Wen. 308. Id. 302.

In *Stafford v. Bryan*,(v) it is held that an acknowledgment, which is to have the effect of taking a stale demand out of the operation of the statute, ought to be *clear* and *explicit*, in relation to the subject or demand to which it refers. The acknowledgment or new promise is to be affirmatively established by the plaintiff ; and if effect can be given to the declarations or admissions made by the defendant, without referring them to the demand upon which the suit is brought, they ought not to be considered as referring to such demand, as evidence of a new promise to pay it.(w)

Where a debtor virtually admitted a demand, barred by the statute, to be unpaid, but instead of *promising to pay it*, or expressing a *willingness* to pay it, declared his inability to do so, that he hoped to see his creditors, and to do something about it ; *held*, that what was thus said was not such an *acknowledgment* of a subsisting debt as to authorize the implication of a new promise.(x)

The mere endorsement of part payment upon a note, bill, or other contract, made within six years, will not avoid the statute, unless it be followed up by proof that the payment endorsed was in fact made, or that the endorsement was made with the defendant's consent,(y) or that it was made when it was against the plaintiff's interest to make it.(z)

(v) 3 Wen. 532.

(w) Vid. 9 Cowen, 674.

(x) 7 Wen. 267 ; and vid. opinion of C. J. Savage in this case at pp. 268, 269, and the cases there cited. Vid. also 13 John. 288. 15 id. 511. 11 id. 146. 6 John. Ch. R. 290. 2 Pick. 268. 5 Cowen, 486. 1 Paige, 239, 625. 7 Wen. 445.

(y) 17 John. 182.

(z) Id., and vid. 13 Wen. 267, where it is held, that the giving of a note, to secure the payment of interest, accrued on another note previously given, is a sufficient acknowledgment to take a case out of the operation of the statute.

The acknowledgment must go to the fact that the debt is still due ; an acknowledgment of the original justice of the claim is not sufficient.(a) But no precise form of words is necessary for this purpose. Thus a promise by the maker of a note, to *settle* it, is equivalent to a promise to pay ;(b) and such a promise to pay any chose in action will enure to the benefit of any subsequent holder.(c)

An inventory and affidavit of a debt, made by an insolvent before a commissioner in order to obtain his discharge, (which was granted,) under the insolvent act, was held a sufficient acknowledgment to take the debt out of the statute.(d)

A stipulation not to plead the statute, in a prosecution for any balance that may be due on a note particularly described, may be used in support of the money counts, though the note be adjudged illegal and void.(e)

Where there is no dispute what the facts are, which are insisted on as taking a debt out of the statute, their effect is a question of law ; otherwise, where the facts are doubtful upon the evidence ; the question is then one mixed of law and fact.(f)

Ch. J. Savage, in delivering the opinion of the court in *Allen v. Webster*,(g) remarks :

"The statute which declares that all actions upon contract without specialty, &c. shall be commenced and sued *within six years* next after the cause of action accrued, and not after, has sometimes been considered as affecting the cause of action, and sometimes as affecting the remedy only ; and hence it has been argued that, if the debt itself is barred and destroyed, the moral obligation remaining to pay it, is merely the consideration for a new promise ; that the new promise is the cause of action, and not the old debt ; and that, therefore, the *new promise must be express* ; a bare admission that the debt was unpaid, not being a ground to raise an implied promise. On the other hand, it is said that the statute does not destroy the debt itself, but prevents the remedy upon it, upon the presumption that the debt has been paid. An admission, therefore, that the debt is due and unpaid, it is said, raises an *implied promise* to pay it. It is not my intention to enter into any speculation

(a) 8 Cranch, 72. 11 Wheat. 314. 12 id. 567. 1 Peters, 351. 2 Pick. 268. 8 Mass. R. 133. 3 Conn. R. 133. 5 id. 480. 6 John. 290. 9 Dowl. & Ryl. 40. 10 Moore, 431.

(b) 8 Wen. 600.

(c) 9 id. 293.

(d) 3 Cowen, 159.

(e) 4 Wen. 652.

(f) 9 Cowen, 674. 7 Wen. 408, S. P.

(g) 15 Wen. 284, 286 to 289.

upon this point, but simply to examine some of the cases decided in this court upon the statute, and to ascertain what is the rule in such cases.

"The earliest case which it is necessary to advert to, is *Sluby v. Champlin*, 4 John. 461. The defendant in that case, when arrested, expressed his surprise that the debt had not been paid by his partner, and promised to meet the plaintiff for the purpose of settling the accounts, if the plaintiff would give time for the payment. Yates, J. says, if a party acknowledges a debt to be unpaid, it is such a waiver of the protection of the statute, as to repel the presumption of payment, being a recognition of the former liability. The judge, however, subsequently remarks, that the defendant had said that the debt ought to be paid, and mentioned eighteen months as the time he wanted for payment. "This," he added, "is a promise sufficient to make him liable." In *Bush v. Barnard*, 8 John. 408, the defendant offered to pay in specific articles. The court said the promise was conditional, and the plaintiff was bound to show that he was ready and had offered to accept the specific articles. In *Dean v. Pitts*, 10 John. 35, the defendant admitted the notes upon which the suit was brought, but said that they had been paid; that he had sent the money to R., and he supposed R. had paid the plaintiff; that if R. had not paid the notes, he, the defendant, would, and that he would not plead the statute. The court said that the defendant admitted the debt, and did not pretend that he had paid it, but supposed his partner had, and assumed the burden of proving such payment. This case comes the nearest to the case now before us, of any in our reports, and it will be seen that there is a material difference. In the present case the defendant said the note was overpaid; he agreed to submit it to men, if the plaintiff would give security for the costs. It does not appear that the plaintiffs offered to give such security and claimed the fulfilment of the promise to submit. *Danforth v. Culver*, 11 John. 146, was upon two notes due more than six years before the commencement of the suit. On presenting the notes to the defendant, he observed they were outlawed, and that he meant to avail himself of the statute of limitations. It was held that this did not authorize the jury to presume a new promise. In subsequent cases the court recognize the doctrine, that the admission of the debt, unaccompanied with a protestation against paying it, is sufficient to imply a promise to pay it. 15 John. 4. 17 id. 330. The case of *Sands v. Gelston*, 15 id. 511, is justly considered a leading case in this court. The subject was fully discussed, and the decision of the court is clear and conclusive. The defendant succeeded the plaintiff as collector of the customs, and received commissions on bonds taken by the plaintiff while in office, more than six years before the commencement

of the suit. Within six years he admitted the receipt of the money, and that it had not been paid over to the plaintiff. He frequently said that if the plaintiff had a claim in law or equity, he would submit it to reference, or compromise the business, but that in his opinion, the plaintiff had no claim. Mr. Justice Spencer gave the opinion of the court, and held himself bound by authority to consider the acknowledgment of the existence of a debt within six years as evidence of a promise to pay the debt; but insisted that if such acknowledgment was qualified at the time in a way to repel the presumption of a promise, then it will not be sufficient to take it out of the statute. I am not aware that this doctrine has been departed from subsequently—most certainly it has not intentionally. In *Purdy v. Austin*, 3 Wen. 189, the case of *Sands v. Gelston* is expressly relied on, and Mr. Justice Marcy uses this strong language: "The unqualified and unconditional acknowledgment of a debt, made by a party within six years before suit brought, is adjudged in law to imply a promise to pay; but an acknowledgment of its original justice, without recognizing its present existence, is not sufficient." This is precisely the doctrine of *Sands v. Gelston*. The case of *Field v. Bradley*, 3 Wen. 272, was decided at the same time with *Purdy v. Austin*. The same case of *Sands v. Gelston* was quoted and adopted, and the rule said to be, that a subsisting indebtedness must be admitted in order to imply a promise. So also Mr. Justice Sutherland, in *Stafford v. Bryan*, 3 Wen. 535, in the court for the correction of errors, quotes the same doctrine from the case of *Bell v. Morrison*, 1 Peters, 351; there must be a present subsisting debt, which the party is willing to pay. In *Dean v. Hewitt*, 5 Wen. 257, the defendant said the debt was an honest one, and he would pay it when he became able; and his ability was proved. The case of *Hancock v. Bliss*, 7 id. 268, and *Patterson v. Choate*, Id. 445, recognize the rule in *Sands v. Gelston* and *Bell v. Morrison*, that there must be a subsisting indebtedness, which the party is liable and willing to pay. See also *Soulden v. Van Rensselaer*, 9 Wen. 293.

"Whatever therefore may be the true philosophy of the rule, and learned judges have differed on that subject, yet since the case of *Sands v. Gelston*, there has been no dispute as to what the rule in fact is, to wit: that to revive a debt barred by the statute of limitations, whether the statute theoretically operates upon the debt itself or upon the remedy only, there must be an express promise, or an acknowledgment of a present indebtedness; a subsisting liability and a willingness to pay it. If the defendant denies its justice, or claims the protection of the statute, no action lies. If we test the testimony in this case by the above rule, it will be found that the action was not sustained. The principal witness

concludes his testimony by saying that in all the conversations which he ever had with the defendant, he invariably insisted that he did not owe the plaintiff, but she owed him. This is very far from admitting an existing demand against him which he is willing to pay."

The above doctrine, as to the avoiding of the statute by acknowledgments or promises to pay, does not extend to cases of tort. *(h)*

The acknowledgment of one partner, after the dissolution of the partnership, will not be evidence of the original debt; yet, after the original debt is proved, such acknowledgment will take the case out of the statute. *(i)* The same rule applies to the acknowledgment of one of several joint makers of a note, *(j)* and of one of several joint debtors. *(k)* This rule, as applied to the cases just mentioned, proceeds upon the distinction between creating a new debt, and merely acknowledging the existence of an old one, within the period limited by the statute. The promise cannot create, but merely revives the debt. *Vid. Grah. Prac. 2d ed. 111.*

Where the promise to pay is made to depend upon a contingency, as where the defendant says he will pay when he gets able, or upon the happening of a certain event; in such cases, in order to take the debt out of the statute, the plaintiff must show that the contingency has happened. *(l)*

OF THE REPLICATION TO THIS PLEA.

We have seen when the plaintiff's disability may be replied in avoidance of the statute. The plaintiff need not, in general, either in his declaration or replication, aver that a new promise was made within six years. But when this plea is pleaded, he may reply generally, "that the defendant did promise within six years, &c. in manner and form as the plaintiff hath in declaring alleged;" thus taking issue on the defendant's plea, and then, proof of any promise or acknowledgment, &c. will sustain the issue for the plaintiff. *(m)* When the plaintiff should state the new promise in his declaration, *vid. ante, 640, 641.*

Another mode of avoiding the statute is to reply, (where this is the fact,) that the suit was commenced within six years. What shall be the commencement of a suit, we have seen, *ante, 451.*

The rule as to what shall be deemed the commencement of a suit in

(h) 3 Har. & McHen. 122. 20 John. 278. *Vid. 2 Brod. & Bing. 872. 1 Barn. & Ald. 92.*

(i) 3 John. 536. 6 id. 267. *Vid. 7 Wen. 441.*

(j) 2 Pick. R. 582. 4 id. 382. 4 Conn. R. 36. 2 Bing. 306.

(k) 3 Pick. 291.

(l) 6 Barn. & Cress. 603. 4 Bing. 105.

(m) 17 John. 330.

courts of record, within the meaning of the statute of limitations, is defined by statute,⁽ⁿ⁾ but has no application to justices' courts. In courts of record, the plaintiff may avoid the statute of limitations, by issuing his *capias ad respondendum*, within the limited time, to the sheriff of the county where the defendant usually resides or last resided, in good faith, and with intent to be actually served.^(o) He may then, after the writ is duly returned, at any time afterwards, sue out other process in the same court and in the same cause, and the court will allow him to enter of record, fictitious continuances from the first process down to the last,^(p) by which there appears a regular prosecution of the suit by process from term to term, till the defendant is finally arrested and brought into court for trial. A cause has been thus continued five, seven, and even seventeen years.^(q) But whether the construction of a justice's court will admit of this form, is perhaps questionable, although nearly the same thing, in substance, may be attained by taking out and procuring the return of a summons. And should a summons be served by copy, and a warrant be thereupon issued, the suit would thereby seem to be continued in fact, for the warrant has no return day. This is, provided the same warrant be ultimately proceeded upon, as it may be, even though the justice be unable to try the cause, as we have seen, ante, 505. But in all other cases, a suit commenced in one court will not prevent the statute from attaching as to an action for the same claim in another court; but the original suit must be continued, and brought to a close in the same court,^(r) unless, indeed, the cause be removed to another tribunal by *habeas corpus* or *certiorari* before judgment,^(s) which proceeding does not apply to a justice's court.

OF THE PRESUMPTION OF PAYMENT ARISING FROM LAPSE OF TIME :

Called in other parts of this treatise, "Implied Limitation."

There was no statute on this subject previous to the recent revision, and yet a lapse of twenty years, without proof of any payment within that time, created a presumption that a debt due by specialty had been paid; as in debt or covenant on mortgages, bonds, or indentures reserving rent, &c.^(t) And this presumption was allowed to be made in less than twenty, as in eighteen or nineteen years, when accompanied by other evidence to fortify the presumption; as a settlement of an account in the intermediate time, without noticing the bond.^(u) But such pre-

(n) 2 R. S. 227, § 38, 39, 40.

(o) Id. § 38.

(p) 7 Mod. 5. 3 T. R. 662. 19 Wen. 291.

(q) 1 Vid. 53. 19 Wen. 291.

(r) Ld. Raym. 883. Till. Ballantine on Lim. 147, and notes.

(s) Str. 719.

(t) 16 John. 210. 10 id. 417.

(u) 7 id. 556. 16 id. 214.

sumption was allowed to be explained away, by showing a disability to sue, a promise, acknowledgment or part payment, &c. &c. at any time within twenty years.(v) It is now provided by statute.(w) that after the expiration of twenty years from the time a right of action shall accrue upon a sealed instrument, for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period.

It should be remarked, that more is required by the statute to repel the presumption of payment, than was required at common law. Formerly, as we have just seen, the presumption might have been explained away, by showing a disability to sue, a promise, acknowledgment, &c. Now, under the statute, the presumption can only be repelled by proof of *payment*, or of a *written acknowledgment*.

We do not quote the provisions of the statute in regard to the presumption of payment of judgments. They apply only to judgments of courts of record. We saw ante, 759, that the statute of limitations runs against a justice's judgment after the lapse of six years. As actions in justices' courts upon judgments rendered by courts of record must, of necessity, from their amount, be extremely rare, (only when a party is willing to remit the excess beyond, or where payments have been made reducing the sum within, a justices' jurisdiction,) it is thought unnecessary even to refer to the provisions of the statute on this subject.

PLEA OF RELEASE.

That after the plaintiff's cause of action in this suit had accrued, to wit, on, &c. the said P., by his certain writing of release, sealed with his seal, and now shown to the court here, the date whereof is the same day and year last aforesaid, did remise, release, and forever quit-claim, unto the said D. all manner of action and actions, cause and causes of action and actions, &c. (*in the language of the release*) both at law and in equity, or otherwise howsoever, which he the plaintiff then had, &c. (*as in the release*) as by the said writing of release will appear.

Though the proper words of a release are *remise, release and forever quit-claim*,(x) yet any words showing an intention to discharge a debt or duty, will amount to the same thing, e. g. the words *renounce, acquit*, or if the plaintiff *grant* that the defendant shall be *discharged*, &c.(y) A

(v) 16 John. 210. 10 id. 417.

(w) 2 R. S. 228, § 48.

(x) Litt. s. 445. Co. Litt. 284.

(y) Plowd. 140. 1 Sid. 265. Cro. Jac. 696. 9 Co. 62. Show. 221.

release by *parol* will discharge a promise or even a covenant *before breach*,^(z) but *afterwards*, such release must be under seal.^(a) And a sealed *executory* contract cannot be released or rescinded by a *parol* agreement.^(b) And a release without consideration, and not under seal, is void.^(c) Where D. bound himself by bond to sell land to C., who gave his notes for the consideration money, and took possession; but afterwards, it was, in pursuance of a *parol* agreement, surrendered to D., who finally sold it, though the bond was not cancelled or surrendered; *yet it was held*, that it was discharged, and that no action would lie on the notes, the whole contract of sale being discharged by the new *parol* *executed* agreement.^(d) And a release by one of several persons, having a joint demand, is valid against all,^(e) even though such demand be the proper subject of *trespass* or *case*, as for a wrong.^(f) And a power of attorney executed on the dissolution of a firm by two partners to a third, authorizing him to ask, claim and receive the debts of the firm, and declaring the appointment irrevocable, does not transfer such debts to the member thus authorized, and consequently does not render inoperative a release subsequently executed by one of the other members of the firm, to one of its debtors.^(g) And a release of a witness, in order to render him competent, if duly obtained, will discharge him of the claim released, though he be not sworn on the trial.^(h)

As to the words which relate to the thing released, a release of *all demands* is the best, excepting the word *claim*; for the word *demand* is the largest word in the law excepting the word *claim*, and discharges all sorts of actions, rights and titles, conditions before or after breach, executions, rents of all kinds, due or to become due, covenants broken, annuities, contracts, recognizances, commons, bonds to pay money not yet due; but not a bond to perform an award, when the money awarded is not yet due, nor a covenant unbroken; for this last should be released by the words *all covenants*.⁽ⁱ⁾ Nor will a release of *all demands* discharge a claim for money afterwards paid by the releasor, as surety for the releasee.^(j)

A release of *all actions*, extends to a bond to pay money in future, *all*

(z) Bac. Abr. tit. Release, (A.) 14 John. 330. 7 id. 207. 17 id. 169. 1 Taunt. 430. 10 Wen. 184. 11 id. 30. 13 id. 71.
 (a) 17 John. 169.
 (b) 13 Wen. 71.
 (c) 1 Cowen, 122.
 (d) 7 Cowen, 48. Vid. 18 Wen. 74, 5, per Savage, C. J.
 (e) 14 John. 172. 13 id. 286. 3 id. 68. 17 id. 58.
 (f) 13 id. 286.
 (g) 9 Wen. 120.
 (h) 16 John. 270.
 (i) Vid. Bac. Abr. tit. Release, (I.)
 (j) 17 John. 169.

causes of action and *all actions* which the releasor has, either in his own right, or as executor or administrator, but not to a debt before the day of payment, nor to executions, though a release of *all suits* would bar an execution; and a release of *all quarrels* is as beneficial as *all actions*. But if a man wrongfully take away my goods, and I release to him *all actions personal*, yet I may take the goods out of his possession.(*k*) Where there are general words alone in a release, they shall be taken most strongly against the releasor; but where there is a particular recital, and the general words follow, these shall be qualified by the recital. Thus, where a release acknowledged the receipt of one dollar in full of a certain judgment, describing it, and also in full of all debts, demands, judgments, executions and accounts whatsoever, *it was held* that it was restrained, by the particular words, to the judgment only, and did not operate upon a mortgage between the parties.(*l*)

A release is sometimes implied by law.

Thus, if a man covenant with, or give a bond to another never to sue the demand which he has against him, this operates as a release, in order to avoid the circuitry of action in first suing for the demand, and then turning round and suing, and recovering the same amount back again on the covenant or bond.(*m*) But this would be otherwise, if the covenant be not to sue until a certain time.(*n*) A bond or covenant by the creditor, to save harmless and indemnify the debtor against the debt, operates as a release of the debt.(*o*)

Again—A release to one of several persons, who are indebted *jointly*, or *jointly and severally*, discharges the whole.(*p*) Not, however, unless it be a technical release *under seal*.(*q*) But a covenant by the creditor not to sue one of several debtors will not have this effect;(r) nor will a receipt in full, on one of the debtors paying his share of the debt.(*s*)

Again—If a creditor appoint his debtor an executor, this extinguishes the debt *at law*, and so, if the debtor marry the creditor.(*t*) Where the payee and holder of a promissory note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note, *in a court of law*, even by a person to whom the executor has endorsed it.(*u*)

(*k*) Vid. Bac. Abr. tit. Release, (I.)

(*l*) 1 Cowen, 122.

(*m*) Vid. Bac. Abr. tit. Release, (A.)

2. 2 John. 186. 8 id. 54. 1 Cowen, 122.

(*n*) Id. ibid.

(*o*) 3 Cowen, 151.

(*p*) 7 John. 207. 2 id. 448.

(*q*) 9 Wen. 336.

(*r*) 7 John. 207. 2 id. 448. 6 Taunt. 289. 8 Mass. R. 423.

(*s*) Id. ibid.

(*t*) Vid. Bac. Abr. tit. Extinguishment, (D.) 2 John. 471. 3 T. R. 557. 13 Mass. R. 151.

(*u*) 9 Barn. & Cross. 120.

The debt is discharged, being considered to have been paid by the executor to himself, and becomes assets in his hands. And upon this supposition it is that the rule *in equity* depends, which makes the executor accountable for the amount of his debt, as assets.(v)

An award of arbitrators, that all suits touching the premises shall cease, is equivalent to a release.(w)

PLEA OF ARBITRAMENT AND AWARD.

Form of, on bond.

That, after the said P.'s said cause of action arose, to wit, on, &c. the said P. and the said D. submitted themselves, that is to say, by two mutual bonds of arbitration, dated the day and year aforesaid, to the arbitration of, and engaged, in all things, well and truly to stand to, obey, abide, perform, fulfil, and keep the award, order, arbitrament, final end and determination of A., B. and C., arbitrators indifferently elected and named, as well by and on behalf of the said P. as the said D., to arbitrate, award, order, judge and determine, of and concerning all, and all manner of action and actions, &c. (*as in the bonds,*) so as the said award, &c. (*as in the bonds.*) And the said D. avers, that before the time limited in the said bonds, for making the said award, to wit, on &c. the said arbitrators, taking upon themselves the burthen of the said award, and having duly considered the subject matters submitted by the said bond, did award, &c. (*as in the award,*) as by the said award, dated the day and year last aforesaid, under the hands and seals of the said arbitrators, will more fully appear. (*If the submission be by agreement, written or sealed in any other form, or by parol, state it according to the truth of the case.*)

The following provisions relating to arbitrations are contained in the statute;(x) we quote them at this place, in order that we may hereafter refer to the various sections as occasion may require, without the necessity of a repetition. The other provisions of the statute have little or no application to this subject, as connected with justices' courts—they relate mostly to proceedings upon awards in courts of record. Before we close, however, we may have occasion to refer to them generally.

(v) 9 Barn. & Cress. 130.
(w) 2 Cowen, 638.

(x) 2 R. S. 446.

§ 1. All persons, except infants and married women, and persons of unsound mind, may, by an instrument in writing, submit to the decision of one or more arbitrators, any controversy existing between them, which might be the subject of an action at law, or of a suit in equity, except as herein otherwise provided; and may, in such submission, agree that a judgment of any court of law and of record, to be designated in such instrument, shall be rendered upon the award made pursuant to such submission.

§ 2. No such submission shall be made, respecting the claim of any person to any estate, in fee or for life, to real estate; but any claim to an interest for a term of years, or for one year or less, in real estate, and controversies respecting the partition of lands between joint tenants, or tenants in common, or concerning the boundaries of lands, or concerning the admeasurement of dower, may be so submitted to arbitration.

§ 3. The arbitrators thus selected, shall appoint a time and place for the hearing, and shall adjourn the same from time to time, as may be necessary; and on the application of either party, and for good cause, they may postpone such hearing, to a time not extending beyond the day fixed in such submission for rendering their award.

§ 4. Before proceeding to hear any testimony, the arbitrators shall be sworn faithfully and fairly to hear and examine the matters in controversy, and to make a just award, according to the best of their understanding.

§ 5. Such oath, and the oaths to witnesses examined before such arbitrators, may be administered by any judge of any court of record, or by any justice of the peace.

§ 6. Witnesses may be compelled to appear before such arbitrators, by subpoenas, to be issued by any justice of the peace, in the same manner and with the like effect, and subject to the same penalties for disobedience, as in cases of trials before justices of the peace.

§ 7. All the arbitrators must meet together, and hear all the proofs and allegations of the parties; but an award by a majority of them, shall be valid, unless the concurrence of all the arbitrators be expressly required in the submission.

Notwithstanding the above provision in section 1, that the submission may be by "an instrument in writing," it is held, that the law in relation to submitting matters in controversy to arbitration, has not been changed in this respect, except in cases where the parties enter into a submission in pursuance of the provisions of the statute, that is, agree that a judgment may be rendered upon the award. The statute does not declare

all other submissions void, nor does it affect a *parol* submission ; such submission is as valid as it ever was.(y)

The submission and award are final and conclusive between the parties, as to all the matters embraced by the terms of the submission, whether the same be *actually* submitted and passed upon at the hearing or not, or whether such submission or award be by writing or parol ; and a submission of *all demands* includes all questions concerning real as well as personal estate, provided the same be proper subjects of submission, within the second section above quoted.(z) And should the parties submit all demands between them, and the arbitrators make an award thereupon, and the party, by mistake, should omit to bring any one of his demands, though entire and distinct, before the arbitrators, yet he cannot afterwards sue for it.(a) And so if the arbitrators commit a mistake,(b) except in chancery, where relief may be obtained in these cases.(c) (1) A submission to arbitration is moreover a discontinuance of a suit, and if, after the commencement of an action, and *before plea pleaded*, all actions, &c. be submitted to arbitration, the defendant may plead the fact, in bar of the further maintenance of the suit. And such a plea is not a plea *puis darrein continuance*.(d) An award under a submission is thus more powerful in extinguishing the claims of the parties than a verdict under a declaration, be it never so broad ; for we have seen, that the plaintiff may, on the trial, withdraw, and reserve an entire demand for future litigation ;(e) but in arbitration, like the defence in *Le Guen v. Gouverneur and Kemble*,(f) every thing which may be heard and determined on either side, is forever extinguished, and cannot be litigated again. Very little form is necessary, either in submitting or deciding by arbitration those controversies which are cognizable before a justice. The parties are, either in writing, or by parol, to agree on such men as they choose, consisting of what number they please, to settle their disputes, whose duty it is, when convened, to hear the proofs and allegations of the parties, as nearly according to the rules of law as may be ; but even

(1) Where the submission is in pursuance of the statute, the court named in the submission have power for certain causes, particularly designated in the statute, to vacate and correct the award. 2 R. S. 447, 448.

(y) 15 Wen. 104, 5, per Mr. Senator Edwards. Vid. also id. 106, per Mr. Senator Maison. Id. 108, per Mr. Senator Tracy.

(z) 5 Wen. 268.

(a) 12 John. 311. Vid. 12 Wen. 379.

(b) 2 John. 62.

(c) Id. 3 John. 367. 9 id. 212.

(d) 12 Wen. 503. Vid. 2 id. 505. But *quere*, whether a mere *submission* to arbitration is a good plea *in bar*. If a mere discontinuance, should it not be pleaded *in abatement* ?

(e) Ante, 727.

(f) Id. 732. Vid. also 12 Wen. 166.

a mistake of the law, or the rules of a court of equity, will not vitiate their award.(g) The parties may agree to submit to them all *claims, demands, actions, suits, quarrels, &c.* between them, the extent of which terms were considered, when speaking of a *release*;(h) or they may limit the submission to any specific subject, to which the arbitrators are bound to adhere strictly, like an attorney to his power;(i) or the award is utterly void, at least so far as the powers of the arbitrators appear to have been transcended on the face of the award. And if it appear, either by the award or otherwise, that they awarded upon a matter not submitted, and their award thereupon cannot be separated from such parts thereof, as might otherwise be valid, but all are intermixed, the whole award is thus tainted and void.(j) However, there is no doubt that an award imposing distinct duties, in distinct parts, may be good as to part, and bad as to the residue.(k)

A very usual mode of submission, where the controversy is not complicated, is, drawing mutual promissory notes sufficient to cover the amount or balance claimed on either side; and agreeing, that the arbitrators shall endorse down or deliver up both or either of the notes as they shall award. A note thus passed upon, and endorsed down, so as to meet what one party ought to recover against the other, has been adjudged binding and valid as a promissory note.(l)

Before the revised statutes, if there were several arbitrators, and it was intended that the voice of a majority, or any number short of the whole, should bind, it was necessary that this should be explicitly agreed upon by the parties; otherwise the award of a majority, &c. would have been void.(m) Now, however, the same rule governs as in cases of reference from courts of record,(n) as we saw ante, 775, § 7, and therefore, in the absence of any stipulation to the contrary, the award of a majority of the arbitrators is valid and binding upon the parties. And this provision of the statute is unquestionably applicable to all arbitrations, whether the submission be by parol or otherwise.(o) And it is not necessary that all the arbitrators should concur in the decision of every question which arises during the hearing, as to the admissibility of evidence.(p) But it

(g) Ambl. 245. 3 Atk. 495. 6 Ves. jun. 282. 3 Caines, 166. Vid. 3 Paige, 124. Neither can it be impeached, in an action, on the ground that it is against law. 7 Cowen, 185.

(h) Ante, 772, and vid. 2 Caines, 320. 9 John. 38.

(i) 6 John. 13.

(j) 16 John. 227. 2 Caines, 285. 3 Cowen, 70. 5 id. 197.

(k) 2 Caines, 234. 13 John. 264. 2 Cowen, 638. 1 id. 117.

(l) 3 Caines, 166.

(m) 6 John. 39.

(n) 11 id. 402.

(o) Vid. 13 id. 187.

(p) 3 Paige, 124.

is necessary, according to the provisions of the section just referred to, that all the arbitrators should meet together ;(q) and that they did do so, should be expressly stated in the award, although, in one case, it was held that this might be shown by proof other than the award itself.(r) But an arbitrator cannot contradict an award he has signed.(s)

The arbitrators being the chosen judges, the delegates and agents of the parties, may bind their principals to do any act touching the matters submitted, which the parties themselves might agree to do, unless, indeed, it be that the party shall cause some third person to do an act, which it does not appear he has a right to require of him.(t) And therefore, where the parties have power to transfer real property, arbitrators may award that they shall do it.(u)

The award must be made within the time limited by the submission, unless extended by agreement,(v) as it may be. And this stipulation to extend the time may be by agreement not under seal, although the submission was by bond.(w) In such a case, however, an action of debt upon the bond itself cannot be maintained ; but the party injured by the breach of the agreement, or the non-performance of the award, must seek his remedy by a suit upon the submission implied in the new agreement, taken in connexion with the bond, or by an action upon the award made in pursuance of such submission.(x) Where no time is limited within which the arbitrators are to make their award, they may take their own time.(y)

The arbitrators should appoint a time and place for the hearing,(z) and see that both parties have notice thereof ; and in one case it was held, that unless this be done, the award is a nullity.(a) It has, however, been recently decided, that a want of notice is no defence, *at law*, to an action on the bond—the party injured must resort to the court of chancery for relief.(b) Where due notice is given, and either party refuse to attend, the arbitrators have power to proceed and decide *ex parte*.

The parol appointment by arbitrators, of an umpire, is good, unless the submission require it to be made in writing.(c)

In relation to the revocation of the powers of the arbitrators, and the consequent liability of the party revoking, *vid. ante*, 637, 638 ; in addition

(q) *Vid.* 2 *Wen.* 494, *contra.* Before the revised statutes.

(r) 7 *Cowen*, 290.

(s) 3 *Paige*, 124.

(t) 13 *John.* 264.

(u) 2 *Cowen*, 638.

(v) *Kyd on Awards*, 96.

(w) 5 *Paige*, 575.

(x) *Vid.* by the Chancellor, 5 *Paige*, 577, and the cases there cited.

(y) *Kyd on Awards*, 96.

(z) *Vid. ante*, 775, § 3.

(a) 6 *Cowen*, 103.

(b) 5 *Wen.* 516.

(c) *Id.*

to which, it is proper here to observe, that before the revised statutes, this revocation might have been made at any time before the award was published; (d) now it must be before the cause is finally submitted to the arbitrators upon a hearing of the parties. (e) This revocation is not complete till notice of it be given to the opposite party, and it must be according to the submission, either by parol or under seal, (f) and, therefore, a submission by bond or other instrument under seal, cannot be revoked by parol. (g) The revocation need not be in any particular form; any thing which shows an intention to revoke, is sufficient. Accordingly, where the parties had submitted to arbitration by bond; and two of them signed and sealed a revocation thus: "To J. S. and S. M., (the arbitrators,) and E. F., (the opposite party,) we the subscribers revoke. Take notice, that the arbitration bonds executed by us and you, dated, &c. referring certain disputes, &c. therein mentioned between us and you, the said E. F., to you, the said J. S. & S. M., as by reference, &c. In witness, &c. This was held sufficiently certain as a revocation. (h)

In case the submission be by parol, it would be enough for the party revoking, to say, in the presence of the arbitrators and opposite party, in general terms, that he revokes their powers under the submission. If the submission be by an instrument under seal, it would be well that the revocation should be in something like the following form:

Form of revocation.

To A. B. and C. D.

Take notice, that I hereby revoke your powers as arbitrators under the submission made to you by E. F. and myself, by our mutual bonds, dated, &c. Witness my hand and seal, this — day —, 1840.

JOHN DOE, [L. s.]

Of this revocation, notice to the opposite party should be given in this form:

(d) Kyd on Awards, 32.

(e) Ante, 637. 2 R. S. 449, § 23.

(f) Kyd on Awards, 32, 33. 8 John.

(g) Id.

(h) 1 Cowen, 335.

Form of notice of revocation.

To E. F.

Take notice, that I have this day revoked the powers of A. B. and C. D., arbitrators, chosen to settle the matters in controversy between us, by an instrument of revocation, of which the following is a copy.

Yours, &c.

JOHN DOE.

(Here insert copy of revocation.)

Where the submission is by two on the one side and one on the other, one of the two cannot revoke the powers of the arbitrators, without the assent of the other.⁽ⁱ⁾

As to the award itself, one rule is, that it correspond with the submission; that is, the arbitrators must not exceed the powers conferred on them, and make an award concerning matters not within the terms of the submission. But we have already seen that an award may be void in part and valid as to the residue. Vid. ante, 777. Under a general submission to arbitration by partners, of accounts, dealings, controversies, demands, &c., as well individually as partnership concerns and transactions, an award giving the joint property to one of the partners, and directing him to pay the other partner a sum in gross, and to discharge and satisfy the debts owing by the firm, is good and will be supported, especially if there be no evidence that the arbitrators have decided matters not in dispute between the parties.^(j) An award of arbitrators may determine a question of location or boundary; and it is competent for the arbitrators to prove by parol the conformity of the award to the submission.^(k) When by the terms of submission to arbitration, the award is to be attested by a subscribing witness, or is required to be made by the arbitrators in any other particular form, the award is not made, and ready to be delivered to the parties, until such form is complied with.^(l)

Another rule is, that the award must be final, that is, it must make a final disposition of the matters embraced in the submission, so that they may not become the subject or occasion of future litigation between the parties.^(m)

The award must also be certain—that is, the act awarded to be done,

(i) 12 Wen. 578.

(j) 5 id. 268.

(k) 12 id. 578.

(l) 5 Paige, 575.

(m) 12 Wen. 577.

and the thing about which it is to be done, should be so far pointed out, that any one can see, or find out what steps are to be taken in performing it; and, accordingly, an award to finish *the house*, or to pay for *the stove*, without saying what house or what stove, is void for uncertainty.(n) So, an award to pay the costs of the arbitration, without saying how much;(o) so an award to give *good and sufficient security*, without defining the nature of the security.(p) And so of the like cases.(q)

Where arbitration bonds were dated August 21st, 1813, and the award was dated August 23d, 1813, and recited bonds dated the 21st of August *last past*; it was held, that if a correct recital were necessary, it should be construed, in support of the award, to refer to the *day*, i. e. the 21st *last past*, instead of the *month*, i. e. *August last past*.(r)

The authority to award costs is necessarily incident to the power of arbitrators;(s) and the penalty of an arbitration bond does not limit their powers, so that they cannot award a sum beyond it.(t)

A promise, by a party in whose favor an award is made, to correct any mistakes which may have been made by the arbitrators, is void for want of consideration; at all events, a defendant cannot avail himself of it by way of set-off or defence in an action on the award.(u)

Where, by the terms of an award, acts are to be performed on the same day by both parties, it is incumbent on the plaintiff, who sues upon the award, to aver performance, or an offer to perform on his part; and if he neglect to do so, the defendant may craveoyer of the award and demur to the declaration, or plead the non-performance of the plaintiff in bar of the action.(v)

Proof that arbitrators, before making an award, resigned their authority, and that such resignation was accepted by the parties, is admissible in bar of an action on the award.(w)

The above remarks and directions, with the forms which we are about to give,(1) will, generally, be a sufficient guide in conducting the proceedings of an arbitration.

(1) In the first edition of the treatise, no form of a Submission bond, or Award was inserted. The omission has given rise to much embarrassment and trouble to many who have not the means or opportunity of referring to books of precedents. We have therefore copied those forms from the Clerk's Assistant, Poughkeepsie ed. 1834, at p. 54, 5, 6, 7.

(n) 2 Caines, 235.	(r) 3 Cowen, 70.
(o) Id.	(s) 2 Cowen, 638.
(p) 9 John. 43. 8 Cowen, 235.	(t) 7 id. 523.
(q) Vid. this rule further exemplified	(u) 2 Wen. 567.
by the cases cited in Kyd on Awards,	(v) 12 id. 591.
123, 4, 128, 194, 196, 7. Vid. also 1	(w) 2 id. 567.
Cowen, 117. 5 Wen. 268.	

Common Bond of Arbitration.

Know all men by these presents, that I, A. B., of the town of P., in the county of D., gentleman, am held and firmly bound to E. F., of the city of —, merchant, in the sum of \$500 of good and lawful money of the United States, to be paid to the said E. F., or to his certain attorney, executors, administrators, or assigns, for which payment, to be well and faithfully made, I bind myself, my heirs, executors, and administrators, firmly, by these presents. Sealed with my seal; dated the —.

The condition of this obligation is such, that if the above bounden A. B., his heirs, executors, and administrators, on his or their parts and behalves, shall, and do, in all things, well and truly stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, and final determination of M. N., O. P., and Q. R., of, &c. arbitrators, indifferently elected and named, as well on the part and behalf of the above bounden A. B., as of the above named E. F., to arbitrate, award, order, judge, and determine, of and concerning all, and all manner of action and actions, cause, and causes of actions, suits, bills, bonds, specialties, judgments, executions, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending, by and between the said parties, so as the said award be made in writing, under the hands of the said M. N., O. P., and Q. R., or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the — day of —, then this obligation to be void; or else to remain in full force.

If it is intended to have a judgment entered on an award, and to give power to a court of record to modify or vacate the award according to the statute, the following clause must be added at the end of the condition, as follows : (x)

And it is hereby agreed, that a judgment of the supreme court of judicature of the people of the state of New-York, (or of the court of common pleas of Saratoga county,) shall be rendered upon the award to be made pursuant to the above submission.

A. B. [L. s.]

Form of an award that one party shall pay money unto the other, and convey an interest as lessee for years in land. All suits to cease. Parties mutually to give general releases.

To all to whom these presents shall come, A. A., of —, C. C., of —, and D. D., of —, send greeting. *Whercas*, divers suits, disputes, con-

(x) Vid. ante, 775, § 1. Vid. also 2 R. S. 447, 8, 9.

troversies and differences, have happened and arisen, and are now depending between E. E., of —, and F. F., of —, for pacifying, composing and ending whereof, the said E. E. and F. F. have bound themselves each to the other, in the penal sum of \$500, by several bonds or obligations, bearing date — last past, before the date hereof, with condition thereunder written, to stand to, obey, abide, perform, and keep the award, order, arbitrament, final end and determination of the said A. A., C. C. and D. D., arbitrators indifferently named, elected and chosen, as well on the part and behalf of the said E. E. as of the said F. F., to arbitrate, award, adjudge, and determine, of and concerning all, and all manner of action and actions, cause and causes of actions, suits, bills, bonds, judgments, executions, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time or times theretofore had, made, commenced, sued, prosecuted, or depending, by or between the said parties, or either of them, so as the said award should be made in writing, under the hands and seals of the said arbitrators, or any two of them, ready to be delivered unto the said parties, or such of them as should require the same, on or before the — day of this instant —, as by the said obligations and conditions thereof, it doth and may appear: *Now know ye*, that the said A. A., C. C., and D. D., taking upon them the charge and burden of the said award, and having deliberately heard the allegations and proofs of both the said parties, do, by these presents, arbitrate, award, order, decree and adjudge, of and concerning the premises, in manner and form following, that is to say,

First, they do award, order, decree and adjudge, that the said F. F., or his heirs, shall and do, on or before the — day of — next ensuing the date hereof, make and execute a good and sufficient conveyance of his interest as lessee for years of a certain farm in the possession of the said F. F., situate —, pursuant and according to the true intent and meaning of certain articles of agreement, bearing date on or about the — day of —, and made between the said F. F. of the one part, and the said E. E. of the other part, or as near the same as the present circumstances will admit.

And also, the said arbitrators do further award, decree and adjudge, that the said F. F., his executors, or administrators, shall and do, on or before the — day of — next ensuing the date hereof, pay, or cause to be paid, unto the said E. E., his executors or administrators, at, or in the now dwelling house of the said E. E., in — aforesaid, the sum of fifty dollars, in full payment, discharge and satisfaction, of and for all monies, debts, duties, due or owing unto the said E. E., by the said F. F., upon

any account whatsoever, at any time before their entering into the said bonds of arbitration, as aforesaid.

And also, the said arbitrators do hereby further award, order, decree, and adjudge, that all actions and suits commenced, brought or depending, between the said E. E. and F. F., for any matter, cause or thing whatsoever, arising or happening at the time of, or before their entering into the said bonds of arbitration, shall, from henceforth, cease and determine, and be no further prosecuted or proceeded in by them, or either of them, or by their, or either of their means, consent, or procurement.

And lastly, the said arbitrators do hereby further award, order, adjudge, and decree, that the said E. E. and F. F. shall and do, within the space of two days next ensuing the date of this present award, seal and execute unto each other, mutual and general releases of all actions, cause and causes of actions, suits, controversies, trespasses, debts, duties, damages, accounts, reckonings, and demands whatsoever, for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of the said bonds of arbitration, as aforesaid. *In witness* whereof, the said arbitrators to this present award have set their hands and seals, this — day of —, &c.

[Seals.]

On application to a justice of the peace, for a subpoena to compel the attendance of witnesses before arbitrators, according to the provisions of the statute, cited ante, 775, § 6, it would seem that he may issue the subpoena without any proof whatever. The present statute, unlike the former act,^(y) does not expressly require proof that a submission has been made. It would be well, however, in all cases, for the justice to take proof of the submission, by the oath of the party or some third person applying in his behalf. The oath to be administered may be in the following form :

Form of the oath.

You do swear that you will make true answers to such questions as I shall put to you, touching the necessity and propriety of my issuing a subpoena, upon your present application therefor.^(z)

On being satisfied from the answers of the party, under oath, that a submission, &c. has been made, a subpoena issues in the following form :

(y) Laws of 1824, p. 285, § 11. Vid. (z) Vid. ante, 464.
also Laws of 1813, p. 399, § 28.

Subpœna to appear before arbitrators.

The People of the State of New-York : To A. B., C. D., and E. F. You, and each of you, are commanded personally to appear and attend at the Inn of Lyndes Emerson, in the town of Wilton, in the county of Saratoga, on the first day of September next, at ten o'clock in the forenoon of that day, before G. H., J. K., and L. M., arbitrators chosen to determine a controversy between N. O., and P. Q., then and there to testify as a witness in relation thereto, before said arbitrators, on the part of the said N. O. Hereof fail not at your peril. Given under my hand, this tenth day of August, 1840.

SETH PERRY, Justice of the Peace.

The form of proceeding against a witness who neglects or refuses to attend, after having been duly subpœnaed, is the same in proceedings before arbitrators as in causes before justices of the peace. Vid. ante, 775, § 6. We therefore reserve this subject for future consideration, with the simple remark, that the forms which we shall hereafter give, applicable to proceedings against witnesses neglecting to attend before justices, will serve every purpose in like proceedings before arbitrators, with some very slight verbal alterations, which will readily suggest themselves.

Form of the oath to be administered to a witness before arbitrators.

You do swear that the evidence you shall give to these arbitrators, (or this arbitrator,) touching or concerning the matters in difference submitted for their (or his) determination and award, by and between N. O., of the one part, and P. Q., of the other part, shall be the truth, the whole truth, and nothing but the truth.(z)

The statute also requires that the arbitrators shall be sworn.(a) And such oath, as also the oaths to witnesses, may be administered by any judge of a court of record, or by a justice.(b) The oath to arbitrators may, unquestionably, be dispensed with, by consent of parties, notwithstanding the statute, yet it is advisable in all cases, that it should be administered. It may be in the following form :

(z) Vid. ante, 464.
(a) Id. 775, § 4.

(b) Id. § 5.

Form of the oath to be administered to the arbitrators.

You and each of you do swear that you will faithfully and fairly hear and examine the matters in controversy, submitted to you as arbitrators, by and between N. O., of the one part, and P. Q., of the other part, and a just award thereof make, according to the best of your understanding.(c)

For a full collection of authorities on the subject of awards, vid. Cowen & Hill's Notes to Phil. Ev. 1025 to 1043.

ACCORD AND SATISFACTION.

This is another remedy by the act of the parties. Instead of calling in the aid of arbitrators, they adjust the difference themselves, determine what the party in default is to do, in satisfaction of the claim or demand against him ; and when such agreement is executed, it is a complete bar of an action for the demand thus satisfied, and may be set up as a defence therein, by a special plea, the same as a former recovery, or award. The settlement or agreement to take up satisfied with such an *act* or *thing*, is called an *accord*. When the act is done, or the thing is actually delivered or paid, pursuant to the *accord*, this becomes a *satisfaction* ; for the demand is then not only *settled*, but *satisfied*. This is distinguishable from payment or performance, which are always in fulfilment of some contract between the parties in the very terms of the contract, at least *in kind*, though not perhaps strictly at the *day* ; whereas, accord and satisfaction is the substitution of some collateral thing in lieu of payment or performance, either before or after a breach of the contract ; or it may be the receipt of a sum of money, or other thing, in satisfaction for some wrong.(d)

FORM OF THE PLEA.

That after the cause of action stated in the declaration of the said P. arose, viz. on, &c. the said D. delivered to the said P., one silver watch, and the said P. then received the same, in full satisfaction and discharge of the claim set forth in the said declaration.

This plea can easily be adapted to the delivery of any other article, or a sum of money, promissory note, or the assignment of a chose in action, or the performance of any other act in satisfaction, &c.

(c) Vid. ante, 464.

(d) Vid. 3 Black. Com. 15, 16. 9 Co. 79.

Accord without satisfaction is no bar. Thus, though the plaintiff had agreed to take a watch, as in the last plea, this alone would not bar the action, even though the watch had been tendered and refused.^(e) It is true that some of the judges thought, in the case in 3 John. Cas. 243, that where the agreement to make satisfaction is such as to afford a remedy upon it by action, a tender alone is sufficient; that case, however, is better put upon the ground that the plaintiff had done therein what was equivalent to an actual acceptance.^(f) And in 19 Wen. 516, 517, Mr. Justice Bronson after stating the rule as above, remarked: "It has been said that a different rule was laid down in 3 John. Cas. 243; but the remark is not well founded. The question there was one of evidence—not of pleading. Thompson, J. said, there were 'circumstances from which the jury might infer an *actual acceptance* at the place where the coal lay, and that they were there at the risk of the plaintiffs.' And Kent, J. said, there were facts from which the jury might infer an *acceptance* on the part of the plaintiffs, and that they were concluded by their declarations from denying an acceptance." If the parties agree that the debtor shall pay a certain sum, or perform any act, as a satisfaction at a future day, this agreement cannot be pleaded in bar to an action brought before the period has arrived; the mere promise being no satisfaction.^(g) Such was the case in 2 T. R. 24; the court saying that the promise was a *nudum pactum* in its creation, for want of consideration, and therefore not binding, unless executed. But in a recent case, 2 Barn. & Adolph. 328, the same court, although impliedly recognizing the authority of the former case, by indicating a distinction, seem to have taken new ground. The latter case was this—a debtor, being unable to meet the demands of his creditors, they signed an agreement, with the assent of the debtor, to accept payment by his covenanting to pay two thirds of his annual income to a trustee of their nomination, and give a warrant of attorney as collateral security. The creditors never nominated a trustee, and the agreement was not acted upon, and one of the creditors brought an action against the debtor for his demand—the debtor appeared to have been always willing to perform his part of the engagement; held, that the agreement, though not properly an accord and satisfaction, was still a good defence under the general issue, as it constituted a valid new contract between the creditor and the debtor, capable of being immediately en-

(e) 2 T. R. 24. 5 id. 141. 9 Co. 79. 1 Ld. Raym. 122. 3 East, 252. 2 H. Bl. 317. 5 John. 386. 3 John. Cas. 243. 19 Wen. 516. 5 Dowl. & Ryl. 138. 3 Barn. & Cress. 257.

(f) Vid. 16 John. 88, per Spencer, J.

(g) Vid. Chit. on Con. 286, and the cases there cited. But quere. It would seem, that if there was a new and good consideration, mutually binding as to the accord, it would be sufficient in such case. id.

forced, and the consideration for which, to each creditor, was the forbearance of the rest, and, as there appeared, no failure of performance on the part of the debtor. Vid. Chit. on Con. 3d Am. ed. 285, 286, *in note*. The assignment and acceptance of a chose in action is a good satisfaction. *(h)* Accordingly, when a creditor, on a compromise with his debtor, accepts the note of a third person for a sum less than the debt due to him, in full payment of such debt, the transfer and acceptance of such note may be pleaded as an accord and satisfaction in bar of an action for the recovery of any portion of the debt beyond the sum secured by the note. *(i)* But the acceptance, by a creditor, of a *dividend* under a *voluntary assignment* made by a debtor without the concurrence of his creditor, and without an agreement on the part of the creditor to accept the assignment in satisfaction of his debt, is not a bar to an action for the balance of the debt. *(j)* And although a creditor who has signed a composition deed, and released his debtor from all demands, cannot, in general, sustain an action against such debtor for any demand arising or contract existing at the time of such composition; still, where such debtor had fraudulently released a judgment assigned by him to his creditor long previous to such composition, and the creditor signed the composition deed in ignorance of the fraud committed upon him; it was held, that notwithstanding the composition and release, an action lay at the suit of the creditor, for a breach of the covenants contained in the assignment. *(k)* Payment of a less sum, after a debt is due, in satisfaction thereof, is not a good plea; *(l)* (1) though a payment of the whole debt without the interest would bar the action; *(m)* and so would the payment of a less sum, if made and received in satisfaction of the debt before it falls due. *(n)* The performance of one of two things stipulated for by an accord, is nugatory, and where it was agreed that the plaintiff and defendant should each deliver up his part of an indenture to be cancelled, and the defendant had delivered up his part, this was held no accord and satisfaction. *(o)* Where the plaintiff agrees to receive any thing in satisfaction of his claim, a delivery thereof to a person appointed by him to receive it, is equivalent to a receipt thereof by himself, and shall be adjudged a satisfaction. *(p)*

(1) Yet an accord and satisfaction of the condition of a penal bond *after* the day of payment, is a good bar to an action on the bond. 7 Cowen, 224.

(h) 5 John. 386. 1 Taunt. 526. 5 East, 230. Vid. 3 Wen. 66.

(i) 14 Wen. 116. Vid. also 20 John. 76. 1 Wen. 172. 3 id. 68. 8 Cowen, 79.

(j) 14 Wen. 100.

(k) 15 id. 351.

(l) 5 John. 271. 17 id. 169.

(m) 5 John. 271.

(n) 2 Lev. 81.

(o) 1 Ld. Raym. 203. 3 Lev. 189.

(p) 16 John. 86.

A deed *before* breach, cannot be discharged by accord and satisfaction without a deed, but *after* breach, accord and satisfaction without deed is a good plea. The satisfaction must be a reasonable one. Generally speaking, the mere acceptance of a less sum, is not, in law, a satisfaction of a greater; and this though an additional security be given. However, an agreement between a debtor and creditor, that part of a large sum due should be paid by the debtor, and accepted by the creditor as a satisfaction for the whole, might, under special circumstances, operate as a discharge of the whole; but then the legal effect of such an agreement might be considered to be the same as if the whole debt had been paid, and a part had been returned as a gift to the party paying. The mere fulfilment of an act which a party is bound in law to perform, is no satisfaction. Conferring a benefit to a third person, at the debtor's request is sufficient.(q)

The satisfaction should proceed from the party who wishes to avail himself of it; for where it proceeds from a stranger, it is a nullity.(r)

OF THE PLEA OF TENDER.

Before proceeding to the consideration of this plea, it may be well to examine, briefly, the law in regard to *paying money into court*. This substitute for a tender is of great practical importance, and of frequent occurrence in justices' courts.

If the defendant be, in point of fact, indebted to the plaintiff, in an action on *contract*, but dispute the amount claimed of him, he may either, tender to the plaintiff the amount which he supposes to be due, (on which subject more at large hereafter;) or he may pay that amount into court and have it considered as stricken out of the declaration. The latter is the safest course, for though the payment of money into court subjects the defendant to costs, up to the time of paying it in, yet if the defendant plead a tender, and the plaintiff take issue thereon, and the defendant fail in proving it, he will thereby subject himself to all the costs of the cause.(s) In courts of record, the paying of money into court is often resorted to, in the place of a tender; and certain rules in regard to the mode of making this payment are established in such courts, which have little or nothing to do with the proceedings in like cases before justices. The rules of practice in the former courts, which relate to this subject, should, however, be adhered to, so far as they well can be, consistently

(q) Vid. Chit. Bl. 3d Book, p. 15, 16, in notes, and the cases there cited, illustrating the above doctrine.

(r) 19 Wen. 408. 6 John. 37. 5 East, 294.

(s) Vid. Grah. Prac. 2d ed. 532.

with the difference in the organization and proceedings of the two tribunals. It seems to be the established practice of the supreme court, to permit the defendant to make his payment into court, at any time before plea pleaded, on a common rule which he is authorized to enter, by which it is ordered, that the defendant have leave to bring into court, the sum admitted, and that thereupon, unless the plaintiff shall accept thereof, with costs to be taxed, in full discharge of his action, the said sum shall be struck out of the declaration, and shall be paid out of court, to the plaintiff or his attorney; and that on the trial of the issue, the plaintiff shall not be permitted to give evidence for the sum brought into court.(t) This payment into court may be made, even after plea, in the supreme court, upon obtaining a judge's order for that purpose.(u) It would seem, in analogy to the above practice in courts of record, that a defendant in a justice's court may, of course, make his payment into court, at any time before plea, and perhaps after, if permitted by the justice. But what course should he pursue in regard to the payment of costs? We have seen that in the supreme court, the defendant brings into court the sum which he supposes and admits to be due, and then awaits the taxation of the plaintiff's costs; but in justices' courts no such practice can prevail. The costs are to be taxed and settled by the justice—no bill is prepared by the party and taxed on notice as in courts of record. And hence the necessity, as we presume, of paying to the justice, not only the amount acknowledged to be due, but of requiring of the justice a statement of the amount of costs incurred by the plaintiff up to that time, and then of paying in that amount in addition.

After the money is thus paid into court, the defendant may plead the general issue and payment, and under these pleas, may avail himself of the payment to the justice, the same as if paid to the plaintiff before suit brought;(v) or he may, undoubtedly, interpose a plea confessing the cause of action to the extent of his payment, alleging it to have been made, and the general issue, and such other defence as he pleases, to the residue.

In what cases the defendant may pay money into court. The general rule is, that he may do it, in cases where the sum demanded is a sum certain, or capable of being ascertained by mere computation. Thus, it is allowed in assumpsit and covenant, where the breach is the non-payment of money. But is not permitted in actions on the case, trespass, trover, nor, as a general rule, in any case where the damages are unliquidated. If the defendant pay money into court, in a case where he is not allowed to do

(t) Id. 594. 3 Cowen, 337.

(u) Id. and the cases there cited.

(v) Vid. 3 Cowen, 336.

so, the plaintiff, by taking it out, will thereby waive the irregularity, and the effect of it will then be the same, as if it had been paid in on a mere money demand. The defendant may pay money into court upon one or more of several counts in a declaration, but he cannot, in such case, demur to the other counts; nor can money be paid into court on part of a count.(w)

In regard to the amount to be paid in, as the object is to save the defendant the further costs of the suit, in case the plaintiff elect to proceed, care should be taken to pay in enough to satisfy the claim admitted by the defendant, together with interest, when recoverable, which should be calculated up to the time of the payment into court, and not merely to the commencement of the action.(x)

Proceedings after payment. Where money has been paid into court, the plaintiff may in all cases take it out, and then either accept it in satisfaction of his debt, or may proceed in his action, at his option.(y) No question of costs can in such case arise, so far as the plaintiff's liability to the defendant is concerned, even though the plaintiff proceed and is defeated in his action; for he has already received the costs up to the time of payment, and I know of no form of judgment by which he can be compelled to refund. The case is different in courts of record, for there, as we have seen, no costs are, in the first instance paid, and therefore if the plaintiff proceed to trial, and the judgment be against him, he will not be entitled even to costs to the time of paying the money into court.(z) If the judgment be in favor of the defendant he recovers his costs of defence, subsequent to the time of payment.(a)

If the plaintiff proceed to trial, and do not prove a debt or damages beyond the sum paid into court, he may be non-suit, or have final judgment go against him, with costs as in other cases. But if he wish to discontinue the action before trial, having proceeded in it after the money was paid in, he may do so, on payment of the defendant's costs after that time, or may discontinue as in other cases, suffering judgment for costs to go against him.(b)

Effect of payment into court. The true rule is, that payment of money into court, admits the cause or causes of action stated in the declaration, to the amount paid in, and nothing more. Beyond that amount the defendant may make his defence. And hence, where a declaration contained a count on a promissory note, and the common money counts, and the money was paid in generally; it was held that the defendant

(w) Vid. *Grah. Prac.* 2d ed. 533, and the cases there cited.

(x) Id. 534.

(y) Id. 535.

(z) Id. 536.

(a) Id. 3 Wen. 326.

(b) Vid. *Grah. Prac.* 2d ed. 537.

was not thereby precluded from going into evidence, to show the total failure of the consideration of the note, in bar of the action, or a partial failure, in mitigation of damages.(c)

The payment of money into court, is, so far as proceedings in justices' courts are concerned, very much the same thing as a *tender after suit brought*, which we shall hereafter consider more particularly. In the former case the money is paid to the *justice*, and in the latter, directly to the *plaintiff*.

FORM OF A PLEA OF TENDER, BEFORE SUIT BROUGHT,

In assumpsit, on a contract to pay money.

As to all the claim of the said P., mentioned in his declaration, *except ten dollars*, parcel of the amount claimed by the said P., the said D. says, that he did not undertake and promise in manner and form as the said P. hath above thereof complained. And as to the said *ten dollars* the said D. says, that after the said *ten dollars* became due, and before the commencement of this suit, to wit, on, &c. he was ready and willing, and offered and tendered to pay to the said P., the said sum of *ten dollars*, to receive which, the said P. then and there refused; and the said D. has always before, and ever since the time of the said tender and refusal been, and still is ready to pay the said P., the said *ten dollars*, and now brings the same into court, ready to be paid to the said P.

In like manner, a tender may be pleaded to part, and a set off to the residue, or a payment, and the statute of limitations, &c. and these pleas may be adapted either to the whole declaration, or to the separate count to which they are thought proper to be applied. In what cases a tender shall be deemed inconsistent and inadmissible with other pleas, *vid. ante*, 715, 716. 4 T. R. 194.

The above form, with the remarks which follow, may also, with a little variation, be applied to a sealed contract for the payment of money.

Plea of tender in specific articles, to an action on the following promissory note.

" LISBON, December 6th, 1815.

" For value received, we jointly and severally promise *Samuel Avery & Son*, in sixty days from date, seven hundred thirty-four dollars, seventy-six cents, in cotton yarn, at ten *per cent.* below the wholesale factory prices, to be delivered at the *Lisbon cotton factory* store.

JOSIAH ROSE, as ag't L. C. F.

ALEXANDER STEWART.

(c) 2 Wen. 431. Vid. also Grah. Prac. 2d ed. 537 to 540, and the cases there cited.

That the 4th day of February, 1816, was Sunday ;(d) that on the next day, the said D. having waited at the said store until the uttermost convenient hour of the day, did then, to wit, between three o'clock P. M. and sun set, offer and tender to the said P., in cotton yarn of a good and merchantable quality, warp and woof, at ten *per cent.* below the whole-sale factory prices, in value \$734,76, that is to say, 10*lb.* No. 20—10*lb.* No. 19, &c. (*specifying the number and the weight of each*), in full payment and satisfaction of the note in suit ; which the said P. refused to receive ; and that the said D. carefully deposited the said yarn, thus tendered, in the said store, and there left the same for the use and benefit of the said P., as their proper goods and estate. Vid. this plea in substance, in 2 Conn. R. 69, 70. It is clearly not necessary, as was done in that plea, to state that the defendants notified the plaintiffs of the time and place of delivery, and that they refused to attend, &c. For the time and place is specified in the note. Id. 74, per Edmund, J.

There is a material distinction between the effect of a tender in *money* due upon a contract, and a tender of *specific articles*. In the former case, "though a tender be made, and the plaintiff refuses the money, yet the tender cannot be pleaded in bar of the action, neither in debt nor assumpsit, but in bar of the damages only, i. e. interest and costs ; for the debtor shall nevertheless pay his debt.(e) But the consequences of a regular tender and refusal, where the articles are cumbrous, and will subject the party tendering to a charge in order to keep them, as cattle, or any articles requiring warehouse room, which, indeed, embraces almost every article except money, are a complete discharge of the contract for delivery, and the party is not bound to hold himself ready, or as the common saying is, *to keep the tender good*, as in case of money ; but he holds the articles as bailee, at the risk of the person to whom they have been tendered, subject indeed to be demanded of him, or any other person into whose hands they may come, and, if refused, an action of trover will lie for their value.(f) If the tenderor dispose of the goods, he will be answerable for the avails ;(g) but he is not responsible for their safe keeping(h)—his duty, in this particular, bears a very near resemblance to that of an accidental finder of goods, mentioned ante, 349,

(d) 2 Conn. R. 69. Ante, 197.
 (e) 1 Ld. Raym. 254. 17 John. 253, Id. 468, per Kent, C. J. 12 John. 274.
 per Spencer, C. J. 3 John. Cas. 249. 1 Hayw. 142. 13 Wen. 95.
 Vid. Bac. Abr. tit. Tender. &c. (c). Vid. (g) Vid. 3 John. Cas. 149, &c.
 1 Bos. & Pull. 332. 5 Cowen, 248. (h) Id.

350. The property of the goods being vested by the tender in the tenderee, an action of trover would of course lie against any person who should convert them to his own use.(i)

Under this head, I shall consider,

I. *By whom a tender may be made.*

A tender made by a servant, or by a stranger, on the behalf and at the desire of the party owing the money, is as good as if it had been made by the party himself.(j)

II. *What is a good tender.*

This relates, 1. To the manner of tendering. It is not enough for the person who intends to make a tender, to say, "I am ready to pay the debt, or perform the duty," but he must make an actual *offer to pay* the one, or *discharge* the other.(k) And the tenderor should moreover declare upon what account it is made ;(l) and a declaration of being *ready* to pay, but keeping the money in a bag under the debtor's arm, or in his pocket, is not such an offer as amounts to a tender ;(m) though it would have been good in the former case, if the bag had been *offered* with the money in it, provided the tenderor be able to prove that the amount is sufficient ; for it is the duty of the tenderee to tell it, and examine its goodness.(n) However, the actual production of the money may be dispensed with by the conduct of the tenderee,(o) as if he refuse it because it is too much ; or because it does not amount to the debt due, together with another debt not due the tenderee, but which he insists on receiving ; or where he tells the tenderor he need not give himself the trouble to produce the money, for some reason which he assigns, or without assigning any reason ;(p) or insist that more is due ;(q) but the circumstance of demanding more than is due, is not sufficient to excuse an *actual tender* of what is due,(r) and notwithstanding a refusal to accept by the tenderee, yet the tenderor must show that the money is ready about him, in his pocket, or in his desk which is present, &c. or the refusal will not make it a good tender.(s) There must be an *offer* of the money, unless it be dispensed

(i) Vid. further on this subject, 2 Kent's Com. Com. 3d ed. 508, 509.

(j) Cro. Eliz. 48.

(k) 1 Leon. 71. 2 Lev. 209. 3 id. 104. 12 Mod. 353. 2 Dall. 190. 15 Wen. 637.

(l) Latch, 70.

(m) Noy, 74. 15 Wen. 637.

(n) 5 Co. 115. 1 Inst. 208. Vid. 5 T. R. 432.

(o) 3 T. R. 683. Peake's R. 88. 4 Esp. R. 68. 5 id. 48. 4 Dall. 327. 2 id. 190.

(p) 3 T. R. 683.

(q) Peake's R. 88.

(r) 6 Wen. 22.

(s) 5 Esp. R. 48.

with by the *express* declaration, or equivalent act of the creditor ;(t) and then, a mere offer to pay is not sufficient ;(u) for saying, "here I am ready," will not do. He must have the money ready also.(v) And though there be a refusal to receive the money, an offer to pay must not be merely *theoretical* by words, but it should be a *practical, manual* offer, by producing the money, or showing it ready for delivery, at least. Indeed, it is unsafe to dispense with its actual production, by the hand of the tenderor,(w) unless, indeed, he be told expressly not to produce it.(x) A refusal to receive must, at any rate, be *absolute*, in order to dispense with the production of the money : refusing, till the creditor consult his attorney, is not a refusal in law.(y)

With regard to a tender of specific articles, such as stock in the funds, &c. or any other chose in action which is the subject of an assignment ; or of cattle, grain, articles of manufacture, goods, or other choses in possession, all the authorities agree that the party making the tender, must do every thing in his power to place himself in a state of perfect readiness to perform, or the tender will not be complete,(z) whether the vendee be present or not. Thus, where the consent of a director is necessary to the assignment of stock, it must be obtained, though the practice be to give consent of course ;(a) and where a note is payable in shop work, the articles must be particularized and set out, otherwise the plaintiff would be barred of his action by the tender, without being able ever to recover the articles tendered, for want of being particularly distinguished and described.(b) We have just noticed,(c) that the effect of a tender is, to place the goods at the risk of the vendee, but while there remains any act to be done by the vendor, in separating the goods from others, with a view to determine there quantity or identity, or the price, the tender is incomplete ; because, till this be done, they are not at the risk of the vendee, but the vendor. Thus, where the vendor was to count certain skins sold, in order to ascertain the price, under an agreement to pay so much for such a number ;(d) or to weigh out certain flax sold, lying at the wharf, as part of a large quantity, from which it was not yet severed by the process of weighing, and the purchaser, therefore, could

(t) 10 East, 101.
 (u) 2 Dall. 190, 191. 10 East, 101.
 15 Wen. 637.
 (v) 2 Hayw. 151. 1 Cox's R. 174.
 (w) 10 East, 103, per Bailey, J. 4
 Esp. R. 67. 15 Wen. 637.
 (x) Id. *ibid*.
 (y) 1 Cox's R. 174.
 (z) 1 Str. 504. 3 John. Cas. 253, per
 Radcliff, J.
 (a) 1 Str. 504. Vid. also 4 Cowen,
 452, S. P.
 (b) 1 Root, 443, 4.
 (c) Ante, p. 793.
 (d) 2 Campb. 240.

not know his part ;(e) and so of a parcel of hemp sold,(f) it was held that in these cases, the counting and weighing, respectively, not having been performed, the property did not pass, and of course, a tender in either of these cases, could not have been insisted on. It is a general rule, that where any act yet remains to be done by the purchaser, to prepare the goods for delivery, until this be done, the property does not pass,(g) and the essential object of *identifying* the goods, and giving the venderee a remedy for them by caption, trover or other action to obtain the goods, or the value of them, is not yet obtained. This is essential; for the party is not to be deprived of all remedy upon his contract, unless another remedy be furnished him by passing the property of the chattels and placing them completely under his control.(h) "The distinction between executory and executed contracts is well defined; the former conveys a chose in action, the latter a chose in possession. In 2 Blac. Com. 443. 1 Com. on Con. 3. 3 John. Rep. 388, 424. 3 id. 44. 5 id. 74. 10 id. 336, this distinction is stated and illustrated. The usual and decisive test in cases of this kind, is to consider at whose risk the subject of the contract was."(i) For further remarks applicable to this subject, vid. ante, 51, 52, 289, 290, 291. Vid. also 9 Pick. 558, as to when property shall be said to have passed from a manufacturer, who owns the materials, and is making the article, (e. g. a wagon,) on contract. The wagon was built by the plaintiff's intestate for the defendant, in pursuance of a contract, but was not completely finished at the time of the intestate's death, and within the time prescribed by the contract. Held that the property in the wagon did not vest in the defendant. No property, in such case, vests until the thing is finished and delivered. The contract was broken by the failure of the intestate to build the wagon, within the time stipulated by the parties. The agreement was executory, not a contract of sale. The defendant's remedy was an action on the promise for the breach of the contract. It was optional with the defendant afterwards, to waive his right of action and accept the wagon, but not to take it without the consent of the plaintiff, (the administrator.) The property in the wagon was clearly in the plaintiff and could not pass to the defendant except by a new agreement or an actual delivery.(k) Vid. also 7 Wen. 404, where it is decided that a delivery of property to the vendee, to be put in a marketable condition, and to be

(e) 2 Maule & Selw. 397.

(f) 5 Taunt. 617.

(g) 15 John. 351. Vid. 12 East, 621.
13 id. 522. 6 id. 614.

(h) 1 Root, 443, 4. 5 John. 119.

(i) 15 John. 351, per Spencer, J.

(k) Vid. 9 Pick. R. 560, 561, per Wilde, J.

paid for thereafter by weight to be subsequently ascertained, is a conditional delivery, and does not pass the right of property to the vendee. So held, where the owner of a pair of fat cattle contracted with a butcher to sell them to him at a given price per quarter, the butcher to take the cattle, prepare them for slaughtering, slaughter them, take the quarters to market, *weigh them, and pay* for the cattle the amount the quarters would come to at \$7.50 per 100 wt., and where the cattle were taken from the butcher by his creditor under an execution for an *antecedent* debt. That case further decides that where any thing remains to be done before the sale can be considered as complete, whether to be done by the *vendee* or *vendor*, as between the parties themselves, the right of property does not pass, although the property be placed in the possession of the vendee.

A tender must be without qualification, that is, there must be nothing raising the implication that the debtor intended to cut off or bar a claim for any amount beyond the sum tendered ; and it has accordingly been held that the tender of a sum of money declared by the debtor to be in *full discharge of all demands of the creditor*, is not good.(l) The same principle will invalidate a tender, where a receipt in full is demanded ;(m) or where an intimation is made that a receipt is expected, as by asking, "have you got a receipt ?"(n) But where a person owes debts to several different persons, who come together, and the defendant tenders them a gross sum amounting to all their claims, which they refuse, and insist on more being due, such a tender is sufficient.(o)

2. The thing tendered. If A. be indebted to B., in divers distinct sums of money, he may make a tender of any one of the sums ;(p) and indeed, the tender of part of an entire debt will stop the interest for so much as is tendered.(q) A tender of more money than is due, is good for what is due ; for the greater includes the less, and it is at the peril of the tenderer, if he take more than is due ;(r) but this is to be understood of a tender in *specie*, the rule is otherwise where the tender is in bank notes.(s) But a tender is good, though the money tendered be mixed with other moneys.(t) If the party be bound to tender certain goods, or a certain sum of money, at the election of the tenderer, at a day and place certain, the election of the tenderer to be made at such day and place, both the goods and the money must be tendered.(u)

(l) 20 Wen. 47.

(m) 2 Phil. Ev. 7th ed. 134.

(n) 7 Dowl. & Ryl. 119.

(o) Peake's Cas. 88.

(p) Bro. Tender. pl. 39.

(q) 1 Campb. 184, in note.

(r) 5 Rep. 115. Str. 916.

(s) 8 Cowen, 88.

(t) 3 T. R. 683.

(u) 1 Leon. 68.

In strictness, no money is a lawful tender, excepting such as is made current by act of congress.

All gold, silver and copper coins, stricken and issued at the mint of the United States, in the manner prescribed by various acts of congress, are a legal tender.(v)

These coins are of the following denominations, and of the value and weight annexed, in standard gold, silver or copper.(w)

GOLD COINS.

Eagles,	\$10.	to weigh 258 grs. in standard gold.
Half Eagles,	5.	129
Quarter Eagles,	2,50	64½

SILVER COINS.

Dollars, to weigh	.	.	.	412½ grs. of standard silver.
Half Dollars,	.	.	.	206½
Quarter Dollars,	.	.	.	103½
Dimes, or tenths of a Dollar,	.	.	.	41½
Half Dimes, or twentieths do.	.	.	.	20½

COPPER COINS.

Cents, or hundredths of a Dollar, to weigh 168 grs. of copper.
Half Cents, 84 grs. of copper.

These coins are a legal tender of payment according to their nominal value, for any sums whatever.(x)

There is no need of weighing these coins for the purposes of a tender: counting is sufficient. Indeed, as we have just seen, they are a good tender for their nominal amount. The stamp of the mint is evidence of their weight. But in regard to foreign coins, the same rule does not prevail. The tenderer may object to the weight, but if he mean to do so, he must place his objection on that ground, and demonstrate it, by weighing the money himself and then refusing it, provided it fall short. These principles are sanctioned by Wade's case, 5 Rep. 114, 15, though they were doubtless carried too far in that case; for it is said in the 4th resolution, p. 115, that it is at the peril of the tenderer, not only that

(v) 2 Laws of U. S. new ed. 267, ch. 117, § 16. 9 id. 579, ch. 770, § 9 to 12. Comb. 387. 1 Inst. 207. Salk. 446.

(w) 9 Laws of U. S. new ed. 579, ch. 770, § 8 to 12.

(x) 9 Laws U. S. new ed. 579, ch. 770.

he count the money and ascertain its value, but that he inspect it and see that it is not counterfeit; which latter has been overruled by our supreme court, in *Markle v. Hatfield*, 2 John. 455. Vid. the opinion of Kent, Ch. J. id. 459.

FOREIGN COINS, WHICH ARE A LAWFUL TENDER.

The following table, which we extract from the *New-York American* of July 25, 1834, presents the value of Foreign gold coins, according to the act now in force,^(y) in a convenient form, and will be found of practical utility:

TABLE OF FOREIGN GOLD COINS,

Which it is declared by the Foreign Gold Coin Bill, shall pass current as money, and be receivable in all payments, by weight, "for the payment of all debts and demands, from and after the 31st day of July, 1834," viz: 1. The Gold Coins of Great Britain, Portugal, and Brazil, of not less than 22 carats fine, at the rate of 94.8-10 cents per pennyweight: 2. The Gold Coins of France, nine-tenths fine, at the rate of 93.1-10 cents per pennyweight: and 3. The Gold Coins of Spain, of the fineness of 20 carats 3.7-16 grains, at the rate of 89.9-10 cents per pennyweight.

NOTE.—The Gold Coins of Mexico and Columbia not being 20 carats 3.7-16 grains fine, are not included in the table, because they are not legal tenders for the payment of debts and demands.

1. GOLD COINS OF GREAT BRITAIN, PORTUGAL AND BRAZIL—22 carats fine.

	Weight.		Contents in	Value in U. S. Currency at 94.8-10 cents per dwt.			Value in U. S. Current at 93.1-10 cents per dwt.		
	dwts.	grs.	grains.	d.	c.	m.	d.	c.	m.
GREAT BRITAIN—									
Guinea, (half and 7s. piece in proportion,).....	5	9.39-89	118.6	5	11		5	11	2
Sovereign, (half in proportion,).....	5	3.171-623	113	4	86	9	4	87	
PORTUGAL—									
Dobraon of 24,000 Rees, (half in proportion,).....	34	12	759	32	70	6	32	71	9
Dobra of 12,800 Rees,.....	18	6	401.5	17	30	1	17	30	6
Moidore,.....	6	22	152.2	6	55	7	6	64	2
Milree, 1755,.....		19.34	18.1	0	78	0	0	78	0
BRAZIL—									
Dobraon,.....	34	12	759	32	70	6	32	71	9
Dobra,.....	18	6	401.5	17	30	1	17	30	6
Moidore,.....	6	22	152.2	6	55	7	6	64	2

NOTE.—There are several Gold Coins of Portugal and Brazil, the Joannese, the pieces of 16, 12 and 8 festoons, and the old and new crusado, which are not included in the above table, because they are not 22 carats fine, and of course are not legal tenders, the words of the act being express—"the gold coins of Great Britain, Portugal and Brazil, of not less than 22 carats fine."

(y) 9 Laws U. S. new ed. 79, ch. 96.

2. GOLD COINS OF FRANCE—nine-tenths fine.

	Weight.		Contents in pure gold.	Value in U. S. Currency at 93.1.10 cents per dwt.	Value in U. S. Currency estimated by the quantity of pure gold compared with the pure gold in the old Eagle of 232 grains.
	dwt.	gr.	grains.	d. c. m.	d. c. m.
Double Louis, coined since 1786, (single in proportion,)	9	20	212.6	9 15 4	9 16 3
Double Napoleon, (single in proportion,).....	8	7	179	7 71 8	7 71 5
New Louis,	4	3.1.2	89.5	3 85 9	3 85 7

NOTE.—The Double Louis, Louis and Demi-Louis, coined before 1786, not being nine-tenths fine are not included in the table, because they are not legal tenders. Neither are the Double and Single Napoleon, or the New Louis exactly nine-tenths fine, but the deficiency is so very small, that it is believed it is covered by what is called the remedy of the mint.

3. GOLD COINS OF SPAIN—20 carats 3.7.16 grains fine.

	Weight.		Contents in pure gold.	Value in U. S. Currency at 89.9.10 cents per dwt.	Value in U. S. Currency estimated by the quantity of pure gold, &c. &c.
	dwt.	gr.	grains.	d. c. m.	d. c. m.
Quadruple Pistole or Doubleloon, coined before 1772, (double, single and half in proportion,)	17	8.1.2	375.3	15 59	16 17 6
Quarter Pistole, or Gold Dollar, coined before 1772,...	1	3	24.2	1 01 1	1 04 3
Doubleloon of 1772, (double and single in proportion,)...	17	8.1.2	372	15 59	16 03 4
Half Pistole of 1772,.....	2	4	46.3	1 94 7	1 99 5
Quarter Pistole of 1772,....	1	3	23.9	1 01 1	1 03

NOTE.—The Quadruple Pistole, Double Pistole and Pistole of 1801, as well as the Coronilla, Gold Dollar or Vintem of 1801, not being 20 carats 3.7.16 grains fine, are excluded from the table, not being legal tenders. The law, in fact, as far as the Spanish Coins are concerned, is nearly a dead letter, because the other Coins enumerated in the above table are considerably more than 20 carats 3.7.16 grains fine. Their value as currency at the rate put on them by law, therefore, is less than their value as bullion. Thus, the Doubleloon coined before 1772 is only worth as currency at the rate of 89.9.10 cents per dwt. \$15.59, while as bullion it is worth \$16.17.6

FOREIGN SILVER COINS.

The following foreign silver coins are of legal value, and pass current as money within the United States, by tale, for the payment of all debts and demands, at the rate of 100 cents the dollar:

Spanish milled dollars, the actual weight whereof shall not be less than 17 dwts. and 7 grs. and in proportion for the parts of a dollar.(z) Dollars of Mexico, Peru, Chili and Central America, of not less weight than 415 grs. each, and those restamped in Brazil of the like weight, French

(z) 4 Laws U. S. new ed. 29, 30, ch. 22, § 1. 9 id. 47, ch. 71.

five franc pieces, weighing not less than 384 grs. each, at the rate of 93 cents each.(a)

Those wishing to inspect more particularly the principles, progress, and mutations of our law of tender, will find all the acts on this subject previous to the year 1824, digested and referred to, in the 8th vol. of the new edition of the laws of the United States, p. 68, 69, title Coins. The volume referred to, is an index to the seven preceding volumes. The reader is also referred to 9 id. 584, 585, in note. For further information on this subject vid. Sanford's various reports on coins, in U. S. Congress, 1830. Vid. also the report of the Secretary of the Treasury of the U. S. 1830, on the same subject.

A tender in bank notes is not good. But it seems such a tender may be made good, if the tenderor accompany it with an offer to get cash for them.(b) And it has been ruled by the king's bench in England,(c) and was afterwards conceded by Chambre, J. in the common pleas,(d) that a tender in bank notes, if not objected to for that reason, i. e. *because they are bank notes*, is a good tender. And so, if the party agree before the day of payment to take bank bills, but when tendered refuse them, provided they are current.(e) Mr. Justice Story, in delivering the opinion of the court, in *United States Bank v. Bank of Georgia*, 10 Wheat. 347, holds the following language: "Bank notes constitute a part of the common currency of the country, and, ordinarily, pass as money. When they are received as payment, the receipt is always given for them as money. *They are a good tender as money, unless specially objected to.*"(f)

If the money in which a tender is legally made, afterwards become current at a less value, or even cease to be current at all, the tenderer must bear the loss;(g) but the plea ought to state specially the kind of money tendered, aver that the defendant was always ready to pay that very money, and he must bring the same identical money which he tendered into court upon his plea.(h)

It seems reasonable that any sort of goods should, unless they are to be delivered according to some sample, be made in a middling kind of goods of the sort.(i) And it has been held, that a contract to deliver iron, made in a certain place, is complied with, by delivering iron obtain-

(a) 9 Laws U. S. new ed. 47, ch. 71.

(b) 1 Crompt. Prac. 152, per Ld. Mansfield.

(c) 3 T. R. 554. Vid. also Peake's Cas. 180.

(d) 2 Bos. & Pull. 526, 529.

(e) 7 John. 476.

(f) Vid. 8 Greenl. 110.

(g) Dyer, 81. Dav. 27. 1 Wash. 29.

(h) 1 Wash. 29.

(i) 6 Bac. Abr. tit. Tender, &c. (B) 2.

ed at that place, which the contracting party believed to be good, although, upon trial, it was found to be bad.(j) A note payable "in leather, such as suits," is payable in such leather as suits the payee.(k)

A note is payable in plank, staves and heading: you must prove a tender of all three kinds, in order to bar an action; and not of one or two kinds only, amounting in value to the note.(l)

III. *At what place a tender must be made.*

If a place of payment or performance be mentioned in the contract, the tender can only be made there.(m) If no place be mentioned for paying a sum in gross, it must be tendered to the party personally, if in the state, but the tenderor is not bound to seek the party out of the state; and a tender to a mortgagee at his house, or at the place where the money was borrowed, if seasonable notice of a tender there be given, and is not objected to by the mortgagee, is good.(n) To the above rule there is an exception, in the case of payment of rent. This exception seems not to have been noticed by Mr. Taylor, in his treatise on the law of Landlord and Tenant. He lays down the rule as follows, at p. 131: "If the rent is to be paid in produce issuing out of the land, and no particular place is agreed upon where the payment is to be made, it is enough for the tenant to have the produce upon the land, ready for delivery on the day of payment; but if the rent be payable in money, the tenant must go and seek the landlord and tender it to him." The rule is the very reverse, as established by authority; and it has, therefore, been held that a tender of rent may be either to the person of the lessor, or upon the land demised, if no other place be mentioned in the lease;(o) and a tender upon the land is good, in such case, whether the rent be payable in money, or any other article, *book accounts*, for instance.(p) The reason of this exception to the general rule, in regard to contracts, is stated by Spencer, Ch. J.(q) to be, that "rent issuing out of the land, *savors so far of the realty*, that it is payable on the leased premises."

In the case of cumbrous articles, you are not bound to carry them with you to seek the person who is to receive them, but you must first seek him, and know where he will appoint to receive them, and there they must be delivered;(r) or, if the parties meet, though accidentally,

(j) 2 Watts' R. 367.

(k) 6 N. Hamp. R. 159.

(l) 2 Hayw. 150.

(m) 6 Bac. Abr. tit. Tender, &c. (C) and authorities there cited.

(n) Id. Vid. 2 Penn. R. 71, per Ross, J.

(o) 6 Bac. Abr. tit. Tender, &c. (C) and authorities there cited.

(p) 16 John. 222. Vid. also 3 Kent's Com. 3d ed. 468. Ante, 423, 424.

(q) 16 John. 224.

(r) Co. Litt. 210, b. 8 John. 477. 4 Cowen, 452. 2 Penn. R. 71, per Ross, J.

where the goods are, at the proper time of delivery, they may be delivered there.^(s) Should the creditor be called on to name a place of delivery, and refuse to do so, the debtor might, beyond all doubt, elect some reasonable place himself, which he should do, giving notice thereof to the creditor;^(t) or he may plead the creditor's refusal specially, in discharge of his obligation.^(u) Vid. on this subject Chipm. on Con. 23 to 27.

Where A. gives B. a note, payable in specific articles, no time or place of payment being mentioned, it must be taken to be their understanding that A. should not deliver the articles until requested by B.; that the time of payment was left with B. to settle, as might suit his convenience. In the case of a contract for the payment of money, the place of payment is not so material; the money is supposed to be with the debtor, wherever he may be, and therefore, when a demand of money is necessary, it may be made at any place. Not so with respect to specific articles, which cannot attend the person of the debtor; they are supposed to be at the debtor's place of residence, and the creditor must there demand the payment.

If a merchant give a due bill to A. payable in goods, and no time or place of payment be designated, the due bill contains an acknowledgment that A. has paid him in advance for the amount in goods therein expressed, and a promise is implied on the part of the merchant, that whenever A. shall call at his store, and present the due bill, he will deliver to him such articles as he shall select out of the goods on hand. The store of the merchant is the place of payment, and no action can be maintained on the due bill until A. shall call at the store of the merchant for the goods, and the merchant shall refuse to deliver such goods as A. shall select. Indeed A. is to be treated as other customers are treated; he has a right to call for a part of the goods at a time, and the merchant has no right to require that the whole amount shall be received at one time. The merchant is also bound to deliver the goods at the marked price, and has no right to charge them at a higher price; and A. has no right to require the price of the goods to be reduced, on the ground that he can purchase the same goods cheaper at another store; for it is to be presumed that A., at the time he made the contract, knew at what price the merchant sold his goods, and paid a consideration accordingly.

If a cabinet maker give a due bill to B., payable in cabinet work, and

(s) 8 John. 477. 1 Inst. 202, 211. 5
Rep. 114. Cro. Eliz. 14.

(t) Vid. 1 Wash. 326, 328, 329.
(u) 2 Penn. R. 71. per Ross, J.

no time or place of payment be designated, the shop or warehouse of the cabinet maker is the place of payment; and B. has a right to select out of the articles on hand, not engaged to other customers; and if all such articles as he shall wish to receive, are not on hand, he has a right to require any such articles as are usually made at such shop, to be made within a reasonable time.

If a blacksmith or other mechanic give a due bill payable in his work, and no time or place of payment be designated, the shop of the mechanic is the place of payment; and the holder of such due bill has a right to call at the shop of such mechanic, from time to time, for such articles, and for the performance of such work as he shall choose within the line of the mechanic's business; and the mechanic is bound to treat him as an industrious mechanic treats his customers, and has no right to tender such articles as he shall select, in satisfaction of the due bill.

The above practical remarks are extracted from Chipman on Contracts, pp. 28, 29, 30. And in this connexion it may be proper to notice the case of *Vance v. Bloomer*, 20 Wen. 196, where the supreme court of this state hold that on a note payable in *ready made clothing*, the payee has no right to demand a garment which has been made for a *customer* at a stipulated price. He may demand payment of such a note in *parcels*, but in order to sustain an action upon it, there must first be a demand and refusal. Vid. also 5 Cowen, 516, where it was held that a note payable in specific articles, without mentioning day or place, if payable in *farm produce*, must be demanded at the debtor's *farm*; if in *merchandise* or *manufactures*, at the merchant's *store*, or manufacturer's *shop*.

For further remarks on this subject, the reader is referred to 2 Kent's Com. 3d ed., 504 to 509. Vid. also 2 Penn. R. 65 to 72. 20 Wen. 197 to 201. Chipm. on Con. 23 to 30.

IV. *At what time a tender must be made.*

Formerly a tender could not be made after suit commenced.(v) But the revised statutes have changed the law in this respect, as we shall see more at large hereafter.(w) For the effect of a tender upon a distress or impounding thereof for rent, vid. ante, 423, 4. Tender of amends for irregularity about a distress for rent, vid. ante, 368, 9. Of amends for an injury done by cattle, damage feasant, ante, 373.

If a debt is to be paid or goods delivered at a certain place, on or be-

(v) Cro. Car. 254. 8 Cowen, 88.

(w) 2 R. S. 457, § 20.

fore a certain day, yet it has been decided that a tender cannot be made till the last day limited ;(x) this rule, however, would hardly be adopted by our courts, it being so palpably at variance with the obvious construction of such a contract. Indeed, in the case where this point was decided, the court "professed there was no occasion to be positive" as to the question ;(y) and it has been determined by the supreme court of appeals in Maryland, that where a bond is conditioned to pay money *at or upon* a certain day, a tender before the day is good.(z)(1) Be this as it may, where the tender is to be made upon a certain day, it must, in order to be regular, be made the uttermost convenient time of that day,(a) till which time the tenderor must wait, unless the parties meet there before, but the tender should be time enough before sun down to enable the tenderee to examine and tell the money or goods by day light.(b)

If no time of payment or performance be mentioned in the contract, it should be done presently, if the payment be in money : if it be in any thing else, as labor, or goods, &c. it should be made in a convenient time, without prejudice to the doer or performer, according to the nature of the act. And, in such cases, it is said the party should not wait for an actual demand,(c) which seems agreed by all the books, if the payment be cash. But the superior court of North Carolina has settled the following distinction on this subject.(d) "Where a promise is to pay a sum of money, but no time is mentioned, it is due presently, and an action lies without any request.(e) But where, under the like circumstances, a promise is made to deliver goods, or to do a collateral act, it is necessary that the party to whom it is to be done, should make a demand of the promisee before an action is brought."(f) And upon this principle, it was held by the court, in the same case, that an action is not a sufficient demand for property lent, though the law implies a promise to return it on request ; but there should be an actual demand before suit.

(1) It is provided by 2 R. S. 277, §26, that "to any action which shall be brought on a bond, which has a condition by which the same is to become void on the payment of a less sum, the defendant may plead payment of the principal sum and interest due by the condition of such bond, before the commencement of such action, in bar thereof, *although such payment was not made strictly according to such condition.*"

(x) 12 Mod. 421.

(y) Id. *per cur.*

(z) 3 Har. & McHen. 85. id. 136, 7, 8.

(a) 1 Inst. 211. Plowd. 172. 5 Rep. 114.

(b) Id. 3 Lev. 104. 2 Conn. R. 74, 76.

(c) 2 Lill. Abr. 572.

(d) Taylor's R. 149.

(e) And *vid. ante*, 192.

(f) *Vid.* 20 Wen. 198.

And in a case in our own courts, (g) it was held, that a note payable in specific articles, without mentioning day or place, is payable on demand, and a special demand is necessary. The same rule is laid down in 2 Watts' R. 139, 140. This last case was as follows: C. and his wife sued H. upon an agreement made by H. to pay C.'s wife, then a widow, the sum of \$33,33 annually during her life; \$10 of which was to be paid in cash, the residue *in trade*, according to her wants, to wit, grain, meat, hay, &c. at market prices. The only question in the case was, whether the plaintiffs could recover the value of the specific articles, without proof of a demand before suit brought. In delivering the opinion of the court, Rogers, J. says: "There is a difference between a contract for the payment of money and the delivery of specific articles. In a contract for the payment of money, the place of payment is not material; the money is supposed to be with the debtor wherever he may be, and therefore when a demand of money is necessary, it may be made at any place. Not so with respect to specific articles which cannot attend the person of the debtor; they are supposed to be at the debtor's place of residence, and the creditor must there demand the payment.

"In the case at bar, if a demand be necessary, no difficulty exists as to the place, as it is evident from the contract, that both parties had reference to the farm on which they resided as the place where the articles were to be demanded and delivered. The contract is for the delivery of the grain, meat, hay, &c. of a stipulated value, as they may be wanted for the support of the widow. She may elect what part she will receive in grain, what in meat, and what in hay, or whether she will receive the whole in the one or other article, or in any other commodity, the product of the farm. It cannot be the duty of H. to make a tender, for, until she makes a demand, it is impossible for him to know what to tender, or in what quantities, or at what time. If a merchant gives a due bill to A., payable in goods, and no time or place of payment be designated, a promise is implied on the part of the merchant, that whenever A. shall call at his store and present the due bill, he will deliver to him such articles as he shall select out of the goods on hand. The store of the merchant is the place of payment, and no action can be maintained on the due bill until A. shall call at the store of the merchant for the goods, and the merchant shall refuse to deliver such goods as A. shall select. Chipm. on Con. 28. *Roberts v. Beatty*, 2 Penn. R. 63. In *Roberts v. Beatty*, the general rule of the common law is said to be, that when no time or place is fixed by the contract for the payment or delivery of specific

property, there must be an offer or tender, within a reasonable time, to pay or deliver : and that is true, where the article to be delivered is specific and ascertained, as two bureaux. But that cannot be the duty of the obligor, when, as here, the time of delivery, the nature and quantity of the article, depend on the election of the obligee."

There is frequently some degree of nicety in determining when a party would be warrantable in waiting for an actual demand, before tender, where the debt or duty is made payable *on demand*, or *on request*, &c. by the express words of the contract. The following seems to be the distinction in such cases: Where I am bound, or engage, in any way to pay *money* on demand, or on request, there an actual demand or request need not be made, even though the money be payable on demand, at a particular place ;(h) but the bringing the suit is a sufficient demand in law ;(i) and there is hardly a single exception to this rule, provided the money be due for a precedent debt or duty,(j) as is generally the case. But a promise to deliver goods, &c. on request, whether in consideration of a precedent debt or duty, or not, as where I receive my pay for an article, and promise to deliver it on demand, or on request, is not broken without an actual demand.(k) And this is especially the case, where I receive goods on a promise, either express or implied, to re-deliver or return them on request or demand : in these cases, an actual request must always be proved, to sustain an action for the damages for non-delivery ;(l) for here is not even a precedent debt or duty, besides the delivery being collateral to the obligation.(m)

And an actual request, before action brought, is equally necessary upon an obligation to perform any other collateral act on request, or on demand, or to pay a penalty on request, as in the following and the like cases : to pay a penalty, on request, for not performing an award ;(n) to pay all the money another has expended for the defendant, on request ;(o) to pay the debt of a stranger on request ;(p) a promise to A. to pay B. \$10 on request ; or if one promise to purchase on request ;(q) to save a man harmless on request ; or, on payment of \$10, to deliver a bond on request ;(r) condition of a bond to make the plaintiff free of the joiner's company, on request, at the end of seven years ;(s) on a stipulation in a

(h) Ante, 187, 8.

(i) Cro. Car. 384. Latch, 209.

(j) 3 Salk. 308.

(k) 5 T. R. 409, and vid. 6 Mass. R.

310. Id. 358.

(l) 3 Salk. 309. Taylor's R. 149.

(m) 8 John. 478.

(n) 1 Saund. 32.

(o) Cro. Eliz. 73.

(p) Latch, 93. 3 Salk. 308.

(q) 3 Salk. 309.

(r) Cro. Car. 335, 6. 2 Buls. 229. 3 id. 297.

(s) 3 Salk. 309.

mortgage, that unless the interest be paid annually on demand, the mortgage shall be forfeited.(t) Vid. also the cases cited in 1 Saund. 33, n. (2), by Williams. And where notes for money drawn, payable at a particular place on demand, are declared by statute to be considered payable on demand, at such place, an actual demand before suit is necessary, at the place specified in the note.(u) And in cases of guaranty to pay the debt of another *yet to be contracted*, the guarantee cannot sue, till he has given notice to the guarantor of the amount of the debt, and made a special request to pay.(v)

Where no time is limited within which the request is to be made, the party may make it at any time during his life.(w)

Where a promise is to pay on the happening of an event, which is or may be as well known to one as the other of the parties, no notice or request is necessary. A request in such a case is only necessary, where the happening of the event is exclusively within the knowledge of the promisee.(x)

Where an individual receives money to deliver to another, as a bailee without hire, there is an implied contract that he is to deliver the money, or return, or account for it within a reasonable time, and if he neglects to do this, he is liable in assumpsit; and that too, without a previous demand.(y) If B. sell A. a horse, to be paid for on delivery, A., in an action for the non-delivery of the horse, must aver and prove a previous request to B. to deliver him.(z)

V. *To whom a tender must be made.*

This may be to a party or privy entitled to the thing tendered. Thus, a tender to an executor, even before he has proved the will, is good.(a) So to the assignee of a contract; but not to a mere stranger; yet on a bond to B., to pay him money for the use of C., a tender may be made to C., he being the one beneficially interested; though, where a bond is to B., to pay money to C., the penalty is not saved by a tender to C., for the condition is to *pay*, and C. may thus, by his refusal, occasion a forfeiture of the bond. A tender of amends to a bailiff, who has distrained beasts, damage feasant, is not good, for he is a mere servant, having no

(t) 2 Hen. & Munf. 95.

(u) 18 John. 341.

(v) Vid. 12 Pick. R. 133, 4, 5, and the cases there cited and commented upon.

(w) Cro. Eliz. 196.

(x) 10 Mass. R. 230.

(y) 6 N. Hamp. R. 537. Vid. the opinion of the court at pp. 540, 541, 542.

(z) 1 Chit. Gen. Pr. 497. 5 T. R. 409. 1 East, 204.

(a) Vid. Bac. Abr. tit. Tender, &c. (E).

power to deliver the beasts.(a) Going to the plaintiff's house, and delivering money to a servant, who goes into the house, but comes back and returns the money, saying that the plaintiff would not receive it, but it must be paid to his attorney, was, by Lord Kenyon, left to the jury as evidence of a tender; and the jury found for the defendant.(b) So a tender to an agent, clerk, or servant, authorized to receive money in the transaction of the business of his principal, is as valid as a tender to the principal,(c) and that, too, although the principal has, in the particular case, revoked the general authority of the agent, for the purpose of avoiding the effect of a tender.(d)

It is no excuse for not receiving the money, that the claim is left with an attorney for collection; and if a merchant's clerk should, for that reason, refuse the money, on its being tendered to him, though the merchant had ordered him not to receive it, it is, notwithstanding, a good tender to the principal.(e) And a tender of the money to an attorney, with whom the debt is left for collection, is good, even though the creditor revoke his power, of which the creditor is informed on the tender being made. Notice of the revocation should have been given before.(f)

VI. *The consequences of a tender and refusal.*

We have already noticed, in general, where the debt or duty remains, and when it is discharged by a tender.(g) In cases where the debt is not discharged, the tender must be kept good, i. e. the amount of money tendered, must be forthcoming on its being demanded by the creditor; or the benefit of the tender is lost;(h) and a subsequent demand of one of two joint debtors, is good against both.(i) We have noticed, that a tender of money merely bars the right to interest and costs;(j) and the debt remains even upon a bond with a penalty.(k) In such case, therefore, the money must be paid into court with the plea, or the defence is a mere nullity.(l) And after paying money into court, on a plea of tender, the defendant can never take it out, even although he have a judgment or verdict in his favor; but the plaintiff may take it out, whether he confess or deny the tender in his replication.(m)

(a) Vid. Bac. Abr. tit. Tender, &c. (E) and the authorities there cited.

(b) 1 Esp. 349.

(c) 20 Wen. 436, per Senator Edwards. Vid. the cases cited by him.

(d) Id. 435, by the chancellor.

(e) 5 Taunt. 307.

(f) 18 John. 110.

(g) Ante, 793, 794.

(h) Kirby, 293. 1 Dall. 407, per McKean, Ch. J.

(i) 1 Starkie's R. 323.

(j) Ante, 793. 12 John. 276, per cur.

(k) 2 John. 24.

(l) Str. 638. 1 Wash. 29. Vid. Grah. Prac. 2d ed. 541.

(m) Id. and the cases there cited.

If the tenderor be ready at the place and time appointed to make the tender, and the tenderee do not attend to receive the money, or other thing tendered, it is the same thing, in effect, as an actual refusal.(n)

VII. *How a tender must be pleaded.*

Every requisite necessary to the validity of a tender, must be shown to have been complied with, or the plea, for want of showing that the party tendering has done all within his power to pay the debt or perform the duty, is not good.

Thus, the plea must not only aver a readiness, (and show *how* the defendant was ready, in a tender of specific articles,)(o) but it must aver an offer to pay or perform, not only at the day, but the uttermost convenient time of the day; and if it do not appear from the plea, that the tenderee was absent, a refusal must also be averred; and where the debt or duty is discharged by the tender, the plea may conclude by praying judgment, and that the plaintiff be barred of his action in the usual way of a plea in bar. In debt for money which has been tendered, you must conclude in bar of damages only; but in assumpsit, which sounds in damages, you are to conclude in bar of damages beyond the sum pleaded as a tender, and so, I suppose, of covenant.(p)

Where the debt or duty is not discharged, the defendant must also aver, that he has been always ready, from the time of tender and still is ready, though this would be obviously unnecessary where the debt or duty is discharged by the tender. And if a certain day be mentioned for payment, but no place specified, it is not enough for the defendant to plead, that the plaintiff was, at that day, out of the state, but he should also aver that he was ready to pay, and so has continued and still is ready, from the time of the tender.(q) Indeed, it is sufficient to observe, with regard to this plea, that it must show that the party pleading it has never been in default; for if he neglect to tender the money at the proper day or place, and in the proper manner, his plea of tender is forever gone.(r) It should show that the plaintiff never had any cause of action;(s) and *always ready*, is of the essence of the plea.(t)

And, accordingly, where you plead a tender for the price of goods sold, work, money, &c. or any thing properly demandable under com-

(n) Vid. Bac. Abr. tit. Tender, &c. (G).

(o) 1 Root, 443, 444.

(p) Vid. Bac. Abr. tit. Tender, &c.

(H) 1, and cases there cited.

(q) Id. 2, 3, and cases there cited.

(r) 8 East, 169, per Ld. Ellenborough, Ch. J.

(s) Id. 171, per Lawrence, J.

(t) Willes, 634, per Abney, J.

mon counts in a declaration, in which cases the debt is, in many instances, due immediately on the consideration being performed, it is enough to show your tender, and say, *always ready*, &c. but the plaintiff may defeat you by replying, and showing a demand and neglect, or refusal to pay at any time after the debt arose, whether before or after the tender.(u)

When the money is brought into court on a plea of tender, the plaintiff is entitled to it at all events, even though he should afterwards be nonsuited, or a verdict or judgment pass against him. And even if the money, or any part of it, be paid in through mistake, yet the court will not suffer it to be restored, either in whole or in part, if no fraud or deceit were practised upon the defendant, which led him to the mistake.(v)

It should be noticed that the foregoing remarks in regard to the manner of pleading a tender, apply only to cases where the tender is made *before suit brought*. Indeed, as we shall see hereafter, a plea is improper in any other case.

VIII. *In what cases a tender may be made.*

It is sufficient, perhaps, to observe under this head, that, at common law, a tender cannot be made in any case, except where the debt or duty is certain, or, which is the same thing, capable of being made certain by computation, or other act of the tenderor. It is, therefore, generally confined to contracts for the payment of money, or some other specific thing. But where the damages must be assessed by a jury, as upon a contract to deliver certain specific articles, without any price being affixed to them by the contract, a tender is inapplicable; and the same distinction applies, in general, to the action of debt and covenant, as well as to an action of assumpsit, as may be seen by the several cases cited in Bac. Abr. tit. Tender, &c. (O) and (P) 1, 3, 4.

It follows, from the above rule, of course, that a tender is inadmissible in trespass on the case, properly so called, trover, trespass, &c. Id. tit. Tender, &c. (P) 2, 8, 9, and the cases there cited. Vid. also on the same subject ante, 790, 791.

A tender may, in general, be pleaded to the common counts in assumpsit.(w)

An exception to the common law rule, as to the cases in which a tender is proper, is made by statute,(x) which allows of a tender of amends

(u) 10 Mod. 81. Willes, 632. 1 (w) Str. 576. Salk. 23, 597. 6 Mod. Wash. 29. 128.
(v) 2 Bos. & Pul. 392. 2 T. R. 645. (x) 2 R. S. 457, § 20.

in actions for casual or involuntary trespasses or injuries. This subject will be considered more at large under the next succeeding head.

OF TENDER AFTER SUIT BROUGHT.

At common law, as we have already seen,(y) a tender could in no case be made, unless before suit brought. The only mode allowed to the defendant, to save himself from costs, where he admitted something to be due, was, as we have also seen,(z) by paying it into court; although even this right extended, as has been already remarked,(a) only to actions where a sum certain was demanded. The relief afforded by this practice, extended to so few cases, and was so limited in its mode of application, that the legislature have extended it still further, for the purpose of preventing vexation and oppression towards defendants.(b)

It is provided by statute,(c) that whenever an action shall be pending upon any bond, which has a condition by which the same is to become void on the payment of a less sum, the defendant may, *at any time before judgment rendered* in such action, pay to the plaintiff, or bring into court for the plaintiff's use, the principal sum and interest due on such bond together with the costs incurred in such action, and thereupon such action shall be discontinued. Under this statute, it may be well to notice the case recently decided by our supreme court,(d) in which it was held, where a bond is conditioned for the payment of money at a future day, with interest semi annually, and it is agreed that in default of the payment of interest at the time specified, *the whole of the debt*, (principal and interest,) *shall become due*, and a default in payment of interest happens, and an action is brought *demanding the whole debt*, that the defendant is not entitled, on bringing into court the arrears of interest with the costs, to a judgment of discontinuance, but is liable to the payment of the *principal as well as interest*.

It is further provided by statute,(e) that when any action at law shall be commenced, for the recovery of a sum certain, or which may be reduced to certainty by calculation, or for a casual or involuntary trespass or injury, the defendant, in any stage of the proceedings, before trial in such causes, or before such damages, shall have been assessed, or before judgment rendered in an action of debt, may tender to the plaintiff, or his attorney, any sum of money which such defendant shall conceive sufficient amends for the injury done, for which such action or proceeding

(y) Ante, 804.

(z) Ante, 789.

(a) Ante, 790.

(b) Vid. Grub. Prac. 2d ed. 542.

(c) 2 R. S. 277, § 27.

(d) 19 Wen. 104. Vid. also 7 Paige, 179.

(e) 2 R. S. 457, § 20, 21, 22 and 23.

was instituted, or sufficient to pay the plaintiff's demand, together with the costs of such action or proceeding, to the time of making such tender. If it shall appear, upon the trial of the cause, or upon the assessment of damages, that the amount so tendered, was sufficient to pay the plaintiff's demand, and the costs of the suit or proceeding up to the time of such tender, the plaintiff shall not be entitled to recover or collect any interest on such demand from the time of such tender, or any costs incurred subsequent to that time, but shall be liable to the defendant for the costs incurred by him subsequent to such time. If the action or proceeding be to recover damages, and it shall appear, that the sum tendered was a sufficient amends for the injury done, and for the costs, as before mentioned, the plaintiff shall not be entitled to recover any costs in any such action or proceeding, incurred after such tender, but shall be liable to the defendant for his costs incurred after that time. If any such tender be accepted by the plaintiff, and he shall thereafter proceed in the action, the sum so accepted shall be deducted from the whole amount of the recovery, and judgment shall be rendered only for the residue ; and an entry of such tender and acceptance shall be made on the record.(1)

Under these provisions of the statute, it will be seen, that the plaintiff may either accept, or decline to receive the tender. Whether he do so or not, is perhaps a matter of no consequence, so far as concerns the liability to pay costs subsequently accruing, in actions before justices of the peace. It is otherwise in actions in courts of record, for there, in case the plaintiff accept the tender, he cannot recover costs against the defendant, unless he recover a judgment of at least fifty dollars over and above the sum tendered ; the costs in such a case being determined, as provided by statute,(f) by the amount of the subsequent recovery. In justices' courts, the recovery of any sum, however small, carries costs ; and hence there can be no doubt, that a recovery of only six cents, in favor of a plaintiff, who has accepted a tender, the judgment being for a sum over and above the amount tendered, will carry costs against the defendant. If the plaintiff do not accept the tender, in an action for damages, he is entitled to a judgment for the sum tendered as damages, and if he recover no more than the sum tendered, the defendant is entitled to the costs accrued subsequent to the tender, but if he recover only six cents beyond, he is entitled to costs—and this is the rule in courts of record.(g) And even after a refusal, the plaintiff may, at the trial, elect to accept the sum tendered, and if he do so, the defendant is bound to pay, or a ver-

(1) In suits before justices, the entry is to be made on the docket.

(f) 2 R. S. 457, § 23.

(g) 13 Wen. 390.

dict must be rendered, or a judgment given for that amount ; and in such case, the costs accrued after demand and a reasonable time to pay, will be deducted from the costs to which the defendant is entitled.^(h) In the case in which these points were decided, Nelson, J., in delivering the opinion of the court, in commenting upon the policy and effect of these statutory provisions, remarks : " If the plaintiff refuses to accept the tender and proceeds in the action, and does not recover a sum exceeding the tender, he must pay the costs accrued after the tender ; which is but the application of the ordinary rule of paying money into court. 1 Saund. 33, c., n. 2. 2 Archb. Pr. 203. ' The 23d § is a new provision, and very properly, in case of *acceptance* of the tender, puts the further litigation of the plaintiff under the peril of payment of costs subsequently accruing, unless he recovers a sum (beyond that tendered) which shall entitle him to costs under the general law of costs.(1) In the other case a recovery of six cents beyond the amount tendered gives costs. If the plaintiff refuses to accept the tender, it is not to be stricken out of the declaration, as when money is paid under the 23 §, or into court, because his only mode of collecting it is by means of the judgment ; and in analogy to the practice of paying money into court, of which this was designed as a cheap and expeditious substitute, the plaintiff is entitled in any event to a verdict and judgment equal to the amount tendered. When money is brought into court, the plaintiff is at all events entitled to it. 1 Saund. 33, n. 2. 2 Archb. Pr. 203. Any other construction would be unjust. The defendant has the benefit of the tender, to the amount of it, throughout the subsequent litigation, the same as if so much had been paid into court ; and this in consequence of his ability to prove that he has acknowledged so much to be due, and has offered to pay it. For the like reason, if the plaintiff changes his opinion and elects to accept, and stops his suit short of a trial, he should be permitted to do so, deducting the costs that the defendant has been subjected to since the tender. This is also analogous to the practice of which this is a substitute. 2 Archb. Pr. 203."

All the proceedings, in cases arising under the provisions of the statute, should, strictly, be entered by the justice in his docket, as they occur. He is required, at all events, where the tender is accepted by the plaintiff, to make an entry to that effect, upon his docket ;⁽ⁱ⁾ and the better course would be, in all cases, to make the docket a faithful record of all the proceedings in the cause, whether specially required by statute or not.

(1) Inapplicable to justices' courts, where the recovery of six pence only will carry costs, as was remarked ante, 813.

(h) Id. (i) 2 R. S. 457, § 23.

A tender under the provisions of the statute above cited is not the subject of a plea.(j)

If the tender is made in a case in which the defendant claims that the trespass or injury was casual or involuntary, he should make out such a case by testimony, and in addition to the ordinary verdict of a jury, in case there is one; or judgment of a justice, where the cause is tried before him alone; the jury should find, or the justice should certify upon his docket, that the trespass or injury for which the action was brought was casual or involuntary. In case such be the finding of the jury, it should also be entered upon the docket of the justice.(k)

Plea of infancy.

That at the time of making the contract declared upon by the said P., the said D. was an infant under the age of twenty-one years.

When infancy is a defence, vid. ante, 265, 6, also ante, 701 to 705.

Plea—in trespass—Justification—taking and impounding cattle damage feasant.

That the said D., before and at the time of the trespass complained of by the said P., was lawfully possessed of a certain close, situate in the town of Saratoga Springs, in the county of Saratoga; and because the cattle in the said P.'s declaration mentioned, before and at the said time when the said trespass is supposed to have been committed, were wrongfully in the close of the said D., there doing damage to him; he took the same cattle so doing damage, and drove them away out of the said close, to a common pound in the said town, which is the same trespass complained of by the said P.

If the beasts were impounded before the damages were appraised, the plaintiff should reply this matter, in order to make the defendant a trespasser from the beginning.

When and how cattle may be taken, *damage feasant*, and impounded, vid. ante, 372 to 389; also ante, 436 to 441.

Plea of justification by the party upon whose execution the plaintiff's goods were taken and sold.

That the said D., before the said time when the trespasses mentioned in the said P.'s declaration are supposed to have been committed, to wit,

(j) Vid. Grah. Prac. 2d ed. 544, 6, (k) 13 Wen. 395.
and the case there cited in note.

on, &c. at a court held, &c. (*set forth the judgment, execution and delivery to the constable, as ante, 597, 8.*) By virtue of which said execution, the said G. C. L., so being constable as aforesaid, afterwards, on, &c. before the return day of said execution, at, &c. did seize and take the goods and chattels of the said P., in his declaration mentioned, for the purpose of levying the moneys, so as aforesaid directed to be levied by the said execution, and did then and there levy a certain sum of money, to wit, the sum of ten dollars, part and parcel of the damages and costs aforesaid, which are the same trespasses whereof the said P. in his declaration complains.

We noticed ante, 699, in note, that a justification under process must be pleaded by the party, though the officer himself may generally justify under the general issue.

A constable appointed by three justices may justify under such appointment, although it were improper; for it is a judicial act, and its validity cannot be drawn in question, in an action against the constable; (l) and so, though he seized goods on a warrant which issued erroneously. (m)

Where a constable is not acting in the execution of his office, or does not pursue the directions of his warrant or process, he is not authorized by the statute cited ante, 698, 9, in note, to introduce his defence under the general issue. (n) And where he executes a warrant in an unreasonable and oppressive manner, and with the avowed and malicious design to vex and oppress the party, an action will lie against him. As where a constable had a warrant to levy a fine, and refused to take the property which the plaintiff tendered him, but took his horse with the avowed intent of hurting his feelings, it was held that an action on the case might be maintained against him. (o)

Where the defendants justify under the same process, the safer way is to do so in separate pleas, each for himself; for if all the defendants justify under the same process in a single plea, if the process will not justify them all, though some of them might be protected by it, the justification fails as to all, and neither of the defendants can be protected by it. (p) But it is otherwise of a joint plea of not guilty; for here one defendant may be found guilty and another acquitted, though the plea be joint. (q)

(l) 8 John. 69.

(m) 2 Bos. & Pull. 158.

(n) 1 Bac. Abr. 690. 3 Burr. 1742.
3 East's P. C. 233. Ante, 28.

(o) 5 John. 125.

(p) 2 Caines, 108. 1 Saund. 28, n. (2).
14 John. 166.

(q) 14 John. 166. 3 East, 62. Cowp. 610.

In *Cleveland v. Rogers*, 6 Wen. 438, it was held, that in justifying under an execution issued by a justice of the peace, it is necessary to set forth the *title* of the *statute* under which the justice acted, and that by virtue thereof he issued process, or that under it a plaint was levied; and further, that in pleading, if the facts necessary to give jurisdiction are omitted to be stated, and it is only alleged that a judgment was rendered, and that an execution was issued *upon such judgment*, without setting forth the execution *verbatim*, so that the court may see whether it afforded protection to the *officer* who executed it, the officer will be considered a trespasser. Now it will be seen that although the manner of setting forth the *execution* in the form of declaration, given ante, 597, 598, is in literal compliance with the rule established by the above case, yet, that in stating the judgment, we have omitted to set forth the *title of the statute* under which the justice acted. This was held, in a late case, not to be necessary in a *declaration* upon a justice's judgment, and, as we humbly conceive, the same reasons which induced the court so to decide with respect to a *declaration*, operate in their full force when applied to a *plea*. They say, in 12 Wen. 473, that "the act of the legislature, conferring *civil jurisdiction* upon justices of the peace, and authorizing them to take cognizance of certain actions, is a *public act*, of which the court is bound to take *judicial notice*." Hence it is unnecessary to set forth either the *title* or *provisions* of the statute. It is enough that it appear from the declaration or plea that the cause of action upon which the judgment was rendered was actually within the jurisdiction of the court.

Plea—defect of line or partition fence.

That the close mentioned in the said P.'s declaration, in which, &c. at the said time, when, &c. did and now does lie next adjoining to a certain close of the said D., situate in the town, &c. the easternmost half of the division fence between which said closes, the said P., at the said time, when, &c. was legally bound to keep in repair; but that at the said time when, &c. the said easternmost half of the said fence was out of repair, by means whereof the cattle mentioned in the declaration of the said P., escaped from the said D.'s said close, into the said P.'s said close, and did the damage complained of by the said P., which are the same trespasses complained of by the said P.

Of this plea, generally, vid. ante, 374 to 389.

Plea—close a public highway.

That at the time of committing the said several trespasses, in the said P.'s declaration mentioned, the said close in which the same are supposed

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as have been committed, was, and still is a public highway; wherefore the said P., at the said time, when, &c. did, with his horses and wagon, pass along the said highway, as he lawfully might, therein using the same as a public highway; and because the same was then and there obstructed by the said rails and posts, so that without the removal thereof, he could not pass as aforesaid, the said D., then and there removed the same out of the way, in order to pass along the said highway as aforesaid, which are the same trespasses, whereof the said P., in declaring, complains.(1)

For the rights of travel on a highway, vid. ante, 371, 382 to 388.

When a river is a public highway or common fishery, ante, 389 to 393.

If any part of the trespass or trespasses alleged, were not committed, plead the general issue as to so much, and your justification will then be "as to the residue of the said trespass, or the said several trespasses, &c."

The above plea puts in issue the title to land, which a justice is not authorized to try; (r) he should, therefore, proceed with the cause, the same as if no such plea were interposed; unless the defendant, as he may do, comply with the provisions of the statute in regard to pleading title, of which we shall speak more at large under the next head.

OF THE PLEA OF TITLE, IN ORDER TO OUST THE JUSTICE OF JURISDICTION.

We have already seen that a justice has no jurisdiction of, and cannot try an action where the title to land shall in any wise come in question; (s) but the defendant, if he wish to oust the justice of his jurisdiction,

(1) "Highways are regarded in our law merely as easements. The public acquire no more than a right of way, with the powers and privileges incident to that right, such as digging the soil and using the timber and other materials found within the space of the road, in a reasonable manner, for the purpose of making and repairing the road, and its bridges. When the sovereign imposes a right of way upon the land of an individual, the title of the former owner is not extinguished; but is so qualified that it can only be employed subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not incompatible with the public right of way. The person in whom the fee of the road is, may maintain trespass, or ejectment or waste. 1 Burr. 143. 2 Str. 1004. 1 Wils. 107. 6 East, 154. 2 John. 363. 6 Mass. R. 454. But when the sovereign chooses to discontinue or abandon the right of way, the entire and exclusive enjoyment reverts to the proprietor of the soil." 15 John. 453, per Platt, J. Vid. also 1 R. S. 521, § 131. As to what constitutes a highway, and when it shall cease or be discontinued, vid. 1 R. S. 517, § 103, 104. 7 John. 106. 2 id. 424. 3 Caines, 307. 10 John. 236. 17 id. 277. 2 Phil. Ev. N. Y. ed. of 1839, 195, 196, and notes there referred to. Vid. also Cowen & Hill's Notes to Phil. Ev. 373, to 374. As to other easements, vid. id. 371 to 373, 257, 375, 376 to 386.

(r) 19 Wen. 373.

(s) Ante, 26. Vid. 2 R. S. 158, § 4.

tion in such an action, must, at the time when he is required to join issue, and not after, plead specially, or give notice under the general issue, that the title to lands will come in question. Such plea and notice may be joined with any other proper plea to the action, and they must be written, signed by the defendant or his attorney, and delivered to the justice, who must then countersign and deliver them to the plaintiff.^(t) These requirements of the statute, with others which we shall presently notice, must be strictly complied with, in order for the defendant to avail himself of the benefits of the statute ousting the justice of his jurisdiction. For although the statute declares that a justice shall not have cognizance of any action where the title to land shall in any wise come in question, yet if the defendant do not plead his defence, or even if he does plead it and fails to comply with the further direction of the statute, the justice has jurisdiction of the cause, and is bound to proceed therein, and the defendant is precluded in his defence, from all evidence drawing in question the title to lands.^(u) But, whether the defendant plead title or not, if it appear on the trial, *from the plaintiff's own showing*, that the title to lands is in question, which title is disputed by the defendant, the justice must dismiss the cause, and the plaintiff pay the costs.^(v)

This plea of title must be interposed at the joining of issue, and not after; and the defendant has no right after issue joined and an adjournment granted, on the adjourned day to withdraw his first plea and plead title.^(w)

This plea is proper in any action where the title to lands shall in any wise come in question. It may be interposed, not only in actions for trespass on lands, where the question of title ordinarily arises; but in all other actions, such as assumpsit, trover, &c. where the defence involves the trial of a question of title to lands. For several cases illustrative of the manner in which the question of title to lands may arise in actions other than for trespass on lands, *vid. ante*, 33, 34.

The language of the statute is very general, and ousts the justice of his jurisdiction in every conceivable case where the title to land may in any wise come in question, on compliance, by the defendant, with the requirements of the statute. Thus, a plea in an action of trespass on lands, that the *locus in quo* is a public or private way, involves the title to lands, and under such a plea, the defendant may deliver to the justice the bond required by the statute and thus oust him of jurisdiction.^(x)

(t) 2 R. S. 168, § 59.

(u) *Id.* § 62.

(v) *Id.* § 63.

(w) 15 John. 304.

(x) 1 John. 146. 6 Wen. 465. 15 *id.* 338. 19 *id.* 373.

And in such a case the parties cannot confer jurisdiction upon the justice by consenting that he may proceed and try the cause ;(y) neither can evidence be adduced by the defendant, under the general issue, showing that the *locus in quo* is a private road.(z)

There can be no doubt in an action of trespass on lands, that a plea in abatement of non-joinder of a tenant in common with the plaintiff,(a) is a plea showing that the title to land will come in question, and authorizes the defendant to give the bond required by the statute and thus remove the cause to the court of common pleas. It will be seen that the statute does not require that the plea, raising the question of title, should be a plea in bar ; neither need the plea show title in the defendant. It is enough that the defendant show, by his plea, that the title to lands will come in question on the trial. This he does, in the case under consideration, by showing that the plaintiff has no title except in common with another, and cannot, consequently, maintain his action except he join his tenant in common as a co-plaintiff.

An action on the case, for overflowing the plaintiff's land by means of a mill dam, where the defendant insists that the dam was erected by permission of the plaintiff, and does not question the plaintiff's title to the land, but simply goes to trial upon the question of permission or license, does not concern the title to lands, and is, therefore, an action of which a justice has cognizance ; though if in such an action the defendant should justify under a prescription(b) to overflow the lands, this would involve a question of title to lands.(c) In an action for a nuisance to a house, title cannot come in question ; for though the defendant have a title to the house himself, he has no right to drive the plaintiff out by creating a nuisance.(d)

For what shall be said to be a question of title, generally, vid. ante, 417, 418, 419, and 422, 423. When the question of title may arise incidentally, either on the plaintiff's own showing or otherwise, vid. ante, 32 to 35.

Under the provision of the statute making it the duty of the justice to dismiss the cause where it appears on the trial from the plaintiff's own showing that the title to lands is in question, it has been held that an action of trespass for digging up the soil in a street, brought by the owner of a lot bounding on the street which had been dedicated to the public, but which had not been accepted or recognized by the local officers as a public street, presented a question of title to land, and could

(y) 6 Wen. 465.

(z) 15 id. 338.

(a) Vid. ante, 681.

(b) As to what a prescription is, vid. ante, 378, 379.

(c) Vid. 2 John. 185.

(d) 13 John. 306.

not be tried in a justice's court.(e) In that case, the street not having been used by the public for twenty years, it was necessary for the plaintiff, in order to show title in himself, to prove certain explicit acts of dedication, a map laying down the street, an agreement among the proprietors that it should be a public street, and his own title deeds bounding him upon it as such; but this evidence the supreme court, on error, held that the justice had no right to consider, under the provision of the statute above referred to. In that case the court further held, that proof of actual possession of a lot adjoining a street, shows a constructive title in the occupant to the soil extending to the centre of the street; but to give such title, the street must have been accepted by the public as such; although dedicated, if not accepted, it remains the property of the original proprietor, subject to the easement or right of way of the purchasers of lots adjoining the street.

Under the statutes in force, previous to the revision, the defendant might plead the common bar of *liberum tenementum*, or freehold in the defendant, no matter how special his title might be, or even though he had no title, the same being in a third person, and this, whether he entered under the authority of that person or not; and under that plea, he might, on the trial, show possession or title out of the plaintiff, and thus defeat his action. Now, by the revised statutes, the rule is changed. The defendant must plead his title specially, or give notice to that effect; and whatever may be the form of his plea before the justice, the same form must be pursued in the common pleas; and the defendant is not permitted to set up any other defence than that disclosed by his plea or notice; and therefore, where the defendant pleads *liberum tenementum* before the justice, and fails to show title in himself on a trial in the common pleas, the verdict must go against him.(f) In regard to the strictness with which parties are required to pursue the forms of pleading before the justice, after the cause is removed to the common pleas, more will be said hereafter.

FORM OF THE PLEA OF

Libertum tenementum; or freehold in the defendant.

JUSTICE'S COURT.

Richard Roe }
ads. } Before JOHN B. GILBERT, Esq. one of the justices of
James Jackson. } the peace, in and for the county of Saratoga.

PLEA.—And the said *Richard Roe*, in his proper person, (or by F. Hoag, his attorney,) comes and defends the force and injury, when, &c. and says

(e) 20 Wen. 96.

(f) 15 Wen. 237.

that the said *James Jackson* ought not to have or maintain his aforesaid action thereof against him ; because, he says, that the said close mentioned in the said declaration of the said *James Jackson*, and in which the said trespasses are therein supposed to have been committed, now is, and at the said time when the same trespasses are by the said declaration supposed to have been committed, was the close, soil and freehold of him the said *Richard Roe*, to wit, at the said town of Saratoga Springs, (*the town or ward mentioned in the declaration,*) wherefore the said *Richard Roe*, in his own right, at the said time, when, &c. broke and entered the said close, in which, &c. and with his feet in walking, trod down the grass there growing, &c. (*enumerating the several acts alleged as trespasses which he means to justify,*) as he lawfully might, for the cause aforesaid, which is the same trespass whereof the said *James Jackson* hath above in his declaration complained. And this he is ready to verify. Wherefore he prays judgment, and that the said *James Jackson* may be barred from having or maintaining his aforesaid action thereof against him.

RICHARD ROE.

(or F. Hoag, Att'y for def't.)

The above plea was delivered to me, at the time of joining issue in the above cause, on the 5th day of Nov. 1840.

JOHN B. GILBERT, *Justice of the Peace.*

If there be several counts for entering *different closes*, the defendant may extend his justification to all of them, (g) by using in his plea the word *closes*, instead of the singular *close*. If the plaintiff allege any act among the other trespasses, which the plea of title will not justify, as if there be a separate count for taking the plaintiff's personal property, without alleging an entry into his *land* or *close*, or if the entering the close and taking away, or injuring the plaintiff's personal property, are charged in the same count, the defendant may, nay should, in safety to himself, plead not guilty, and go to trial as to these, and plead his title in justification of the residue ; in which cases the plea will run thus :

In the first case.—"As to the first count in the declaration, the defendant says that he is not guilty of the trespasses therein mentioned, in manner and form as is therein alleged."

(g) 6 John. 63. Vid. 2 R. S. 169, § 66.

"And as to the second count in the declaration of the said *James Jackson*, the said *Richard Roe*, in his proper person, (or by F. H., his attorney,) comes and defends, &c. (*as in the above plea of title, only referring to the particular count or counts which you answer, by title, instead of the whole declaration.*)

In the second case—where two kinds of trespasses are blended in one count.—"As to the taking and carrying away the said hay in the plaintiff's declaration mentioned, the defendant saith he is not guilty thereof."

"And as to the residue of the trespasses in the declaration of the said *James Jackson* mentioned, to wit, entering the close and treading down the grass and cutting the timber mentioned therein, the said *Richard Roe* comes and defends, &c., (*justify by title as above.*) which is the same residue of the trespass, whereof the said *James Jackson* hath above in declaring complained."

The foregoing remarks, in regard to the mode of pleading title, where there are several counts in the declaration, apply with equal propriety to the giving of notice under the general issue, which is, as we have seen, authorized by the statute. The defendant may either plead or give notice of his defence; if he prefer the latter course, the following form may be adopted—to be varied, if necessary, to suit the cases above mentioned:

JUSTICE'S COURT.

Richard Roe }
ads. } Before JOHN B. GILBERT, Esq. one of the justices of
James Jackson. } the peace, in and for the county of Saratoga.

And the said *Richard Roe*, in his own proper person, (or, by F. H., his attorney,) comes and defends the force and injury, when, &c., and says that he is not guilty of the premises laid to his charge, in manner and form as the plaintiff in the above entitled cause has therein declared against him.

RICHARD ROE.
(or F. H., Att'y for def't.)

TO JAMES JACKSON—Sir :

Take notice, that on the trial of the above cause, the defendant will give in evidence that the said close, in the plaintiff's declaration mentioned, and in which the injuries complained of are supposed to have been committed, with the appurtenances, is, and at the time when the said injuries were supposed to have been committed, was the soil and freehold

of the said defendant ; and that the said defendant, in his own right, at the said time, when, &c. as the close, soil and freehold of the said defendant, broke and entered, and did all and singular the acts whereof the said plaintiff in his declaration complains, as he lawfully might. Dated at Saratoga Springs, Nov. 5th, 1840.

RICHARD ROE.
(or F. H., Att'y for def't.)

The above plea and notice were delivered to me, at the time of joining issue in the above cause, on the 5th day of Nov. 1840.

JOHN B. GILBERT, *Justice of the Peace.*

This plea, or plea and notice, must be signed by the defendant or his attorney, delivered to the justice, countersigned by him in the above form, and then delivered to the plaintiff.^(h)

The defendant cannot plead that all the closes in the different counts of the plaintiff's declaration, are one and the same close, defining it, and then plead that that close was his freehold ; but where he undertakes to define the close mentioned in the count, and justify under a title to the close thus specified, he should plead a separate justification as to each close.⁽ⁱ⁾

It is proper to notice, before I leave this head, that in the second case above mentioned, where the plaintiff sets forth an entry into his close, and that act followed by certain other trespasses, as by expulsion of the plaintiff, or indeed any other act which would constitute a trespass in itself, independent of the entry, these things will generally be esteemed mere matters of aggravation ; and whatever will justify the entry, will justify all matters alleged by way of aggravation ; so that, though it is advisable to take issue on matters laid in aggravation, which are untrue, and justify under a plea of title to the residue, yet a plea of title justifying the entry will generally reach all the acts following the entry, and justify them also ; and if the plaintiff mean to avail himself of them in a justice's court, as independent trespasses, he must state them in a separate count, in which case we have just shown how to treat them, or he must new assign them in his replication.^(j)

That what will justify the entry, will also justify the matters laid in aggravation, *vid. ante*, 357, and *Taylor v. Cole*, 1 H. Bl. 555, the cases there cited by the counsel for the defendant, p. 560, and the argument of Lord Loughborough, p. 561, 2.

(h) 2 R. S. 168, § 59.
(i) 6 John. 63.

(j) *Vid. ante*, 655.

It will be seen that the forms of pleas and notice, given above, apply only to the action of trespass on land. In case a defendant wishes to raise a question of title in any other action, he has simply to plead his defence in the usual form, taking care that the plea is signed and delivered to the justice, as required by the statute.

It is provided by statute, as should perhaps have been noticed in more immediate connexion with the above forms, that if a plaintiff's declaration in a suit before a justice shall contain several counts or causes of action, to one or more of which a defence of title to lands be interposed by the defendant, and he shall tender a plea, or a plea and notice, to such count, or cause of action, and deliver a bond as provided by the statute, the justice shall discontinue proceedings for such cause of action, and the plaintiff may commence a suit in the common pleas therefor; and for the other causes of action, the justice may continue his proceedings.^(k)

From the language of the statute, and the necessity of the case, it is probable, that in a case of the kind contemplated in the above section, no costs would have to be paid by either party, as is required in other cases, as we shall see directly, but they would abide the event of the suit before the justice.

A plea or notice of title is a mere nullity, and the justice will have jurisdiction of the cause, and may proceed therein, and the defendant shall be precluded from all evidence drawing in question the title to lands, unless at the time of tendering such plea, or plea and notice, the defendant, with at least one sufficient surety, to be approved by the justice, enter into a bond to the plaintiff, in the penalty of one hundred dollars, conditioned if such plaintiff shall commence a suit in the court of common pleas of the county, within thirty days thereafter, for the same cause of action whereon he relied before the justice, that such defendant shall appear and put in special bail, in such court, within twenty days after the return of process in such suit.^(l)

The competency of the surety may be inquired into, on oath, by the justice, if he deem that necessary. The surety should justify in twice the amount of the penalty in the bond. If satisfactory security is not tendered, it is the same as if no bond were delivered, and the justice should proceed with the cause, disregarding the defendant's plea of title entirely.

FORM OF BOND, ON PLEADING TITLE.

Know all men by these presents, that we, *Richard Roe* and *John Doe*, of the town of *Saratoga Springs*, in the county of *Saratoga*, are held and

(k) 2 R. S. 169, § 66.

(l) Id. 168, § 60.

firmly bound unto *James Jackson*, of the same place, in the sum of one hundred dollars, to be paid to the said *James Jackson*, or to his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we jointly and severally bind ourselves, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated the 5th day of November, 1840.

Whereas, in a suit before *John B. Gilbert, Esq.*, one of the justices of the peace of the county of Saratoga, wherein the above named *James Jackson* is plaintiff, and the above bounden *Richard Roe* is defendant, the said *Richard Roe* has pleaded specially a plea, (or, under a plea of the general issue has given a notice,) showing that the title to lands will come in question in the said suit:

Now therefore, the condition of this obligation is such, that if the said *James Jackson* shall commence a suit against the said *Richard Roe*, in the court of common pleas of the said county of Saratoga, within thirty days hereafter, for the same cause of action whereon he relied before the said justice, and the said defendant *Richard Roe* shall appear, and put in special bail in said court within twenty days after the return of process in such suit; then this obligation to be void, otherwise of force.

RICHARD ROE, [L. s.]

JOHN DOE, [L. s.]

Sealed and delivered, in presence }
of, and the surety approved by, }

JOHN B. GILBERT, *Justice of the Peace.*

This bond must be delivered to the justice at the time of tendering the plea, or plea and notice; and thereupon, the statute declares that the action shall be discontinued, and each party shall pay his own costs. The costs so paid by either party are to be allowed to him, if he recover costs in the action brought in the common pleas, if any be brought; but if no suit be brought in the common pleas for the same cause of action, within thirty days after the delivery of the bond, the costs and expenses of the defendant before the justice, may be recovered by him of the plaintiff.(m)

It is said by Judge Pennington, in his treatise on the courts for the trial of small causes in New-Jersey, under an act somewhat similar to our own, that inasmuch as the act does not direct into whose hands the bond shall be put and remain during the pendency of the controversy, and as it is taken in the name of the plaintiff and for his benefit, there

(m) 2 R. S. 168, § 61.

is no impropriety in the justice's delivering it to the plaintiff with the plea.(n) Our statute directs that the bond shall be delivered to the justice, but is silent as to what shall be done with it afterwards. In the absence of any direct authority for the justice to deliver it over to the plaintiff, the safer course would be for him to retain it, subject to its being produced by him in case any subsequent suit between the parties should require it. Beside, the impropriety of putting it into the possession of the plaintiff is the more apparent, when we consider that the production of it on the part of the defendant may be necessary, in order to entitle him to recover his costs before the justice, in case the plaintiff fails to commence his suit in the common pleas.

Under the statutes in force previous to the revision,(o) which provided that the condition of the bond should be, that the plaintiff should commence a suit *before the next court of common pleas, &c.*; it was held, that the plaintiff complied with the condition of his bond if he issued his writ at any time *during the next term of the common pleas*;(p) and in another case, where the suit was commenced in the common pleas nearly a year after the bond was given, and after two terms of the court had intervened, it was held that the defendant was, notwithstanding this delay, compelled to interpose the same plea which he put in before the justice; and that the plaintiff, by his neglect in not commencing his action by the next term of the common pleas, merely lost his right to compel the defendant to put in special bail or forfeit his bond.(q) The present statute requires that the suit in the common pleas shall be brought *within thirty days* after the giving of the bond; and if not brought within that time, the defendant is authorized to recover his costs and expenses before the justice. These positive enactments of the statute would seem to establish that the suit must be brought within the time specified; and yet it is by no means clear that the only consequence resulting from an omission to do so, would be, within the principle of the case last cited, to deprive the plaintiff of the right to exact special bail of the defendant, and also to deprive him of a defence to an action by the defendant for his costs before the justice. I am not aware that this question has been decided.

The plea of *liberum tenementum* admits the trespass, and is conclusive evidence that the defendant means to rely upon the title only to justify the trespass.(r) But if he pleads the general issue and gives notice of title, as we have seen he may do, then the burthen of proving the tres-

(n) Vid. Penning. on Small Causes, 192.

(o) Laws of 1813, p. 390, § 7. Laws of 1824, p. 253, § 9.

(p) 10 Wen. 668.

(q) 6 Cowen, 610.

(r) 2 Caines, 28.

pass lies upon the plaintiff. Yet if he fail to do so, and judgment goes for the defendant, (no question of title arising before the common pleas,) still the plaintiff may recover his costs against the defendant. So that, in effect, the rights of the parties are not affected, whether the defendant pleads specially, or pleads the general issue, and gives notice of title. Hence it is provided by statute, that if the judgment in the court of common pleas be for the plaintiff, he shall recover costs; if it be for the defendant, (other than judgment of nonsuit or *non-pros.*) and the presiding judge shall not certify that the title to lands did come in question, the defendant shall not recover costs, but shall pay costs to the plaintiff.(s)

It is provided by statute, that when a suit is discontinued before a justice, by the delivery of a plea, or a plea and notice, and a bond, in the manner above mentioned, the plaintiff may prosecute an action for the same cause, before the court of common pleas of the county where such cause of action accrued; and the plaintiff, in such suit, shall declare only for the same cause of action whereon he relied before the justice; and the plea, or plea and notice of the defendant, shall be the same which he tendered to the justice.(t)

This provision of the statute was intended to regulate the identity between the action before the justice and that subsequently brought in the common pleas. Under the old act, as we noticed, ante, 821, where the defendant pleaded before the justice, the common bar of *liberum tenementum*, he was permitted on the trial in the common pleas, under that plea, to show possession or title to the premises out of the plaintiff, and thus defeat his action, whether the defendant had any title or not. Another rule was, that if the plaintiff declared generally, that is, merely stated the trespass to have been committed upon his close situated in such a town, without describing it by metes and bounds, the defendant might defeat his action by proving title to any close in the same town; for inasmuch as no description of the particular close trespassed upon was given in the declaration, it was impossible for the court to say that the premises to which the defendant proved title in himself might not be the very close referred to in the declaration. Such being the law in regard to these points, the question arose in the case of *Ellice v. Boyer*, 8 Wen. 503, whether the defendant was not entitled to a verdict, by showing under his plea of *liberum tenementum*, where the declaration was *general*, that the plaintiff had not possession of, or title to the *locus in quo*, by proving title to lands generally in *third persons* in the same town.

(s) 2 R. S. 168, § 65.

(t) Id. § 64.

The court held that a defendant could not thus defeat the plaintiff's action; but that it was his duty, in order to avail himself of the right to show title out of the plaintiff, notwithstanding his plea of justification, to have objected to the generality of the description of the premises, when the plaintiff would have been at liberty to new assign, and thus avoid the objection. I make these remarks, merely for the purpose of showing the difficulties which existed under the act in force previous to the revision. Now, although the rule last mentioned remains the same as before the revised statutes, yet the defendant is bound by his plea before the justice, and is not permitted to interpose any other defence than such as is disclosed by his plea. If he pleads title in himself, he must show it, and will not be allowed to defeat the plaintiff's action by proving title in a third person; and so of other cases.^(u) A plaintiff always runs a great hazard by trusting to a declaration, general in its terms; for if the defendant should interpose no objection to the generality of the declaration, but should content himself by pleading title in himself, he might obtain a verdict in the common pleas, by proving that he owned any lands in the town. This would prove nothing as to the real dispute between the parties, and would leave the plaintiff worse off than when he commenced his action. For these reasons, a plaintiff cannot be too cautious and particular in describing the premises in his declaration. This he should do with great particularity, and, indeed, with a rigid adherence to form and the technical rules of pleading. In other words, as he is to abide by his declaration in the common pleas, it ought, in strictness, to be as carefully drawn as though he were commencing an original suit in that court.

Where a defendant puts in a plea in the common pleas, different from that tendered to the justice, the remedy of the plaintiff, if he wishes to get rid of the plea, is by *motion* to have it struck out; and it seems, that a like motion may be made by a defendant, should the plaintiff declare for a cause of action different from that relied on before the justice.^(v) If such objectionable pleadings are not stricken from the record, the cause must be tried upon the pleadings as they exist; as an averment on the one hand that the pleadings are the same as those interposed in the justice's court, and on the other a denial of their identity, is not the subject of an issue.^(w) Where, in the declaration in the common pleas, the plaintiff averred the trespass to be the same complained of before the

^(u) Vid. ante, 821.
^(v) 11 Wen. 642. Vid. also S. C. 12
 id. 297.

^(w) 11 Wen. 642.

justice, and the defendant prefaced a plea of the general issue with a denial of the identity of the cause of action, and at the same time put in a plea of *liberum tenementum*; it was held, that such denial of identity was surplusage, and that the plea, stripped of such superfluous matter, being the general issue, gave the defendant the full benefit of such defence; and that he was not bound, in the first instance, to rely upon his plea of title.(x) Where the pleadings are variant from what they were before the justice, and the parties have acquiesced in such variance, the cause will be treated as an original suit in the common pleas, both in respect to the trial and the costs.(y) Although a plaintiff may *new assign* in a justice's court, yet he cannot do so in the common pleas, when the cause is removed to the latter court by a plea of title.(z)

On *appeal* from a justice's judgment, in an action of trespass upon lands, the defendant is not at liberty to show *title in himself*, when the plea put in by him before the justice is the *general issue*.(a)

SECTION XIV.

OF THE REPLICATION TO A SPECIAL PLEA IN BAR.

Every special plea in bar is, like a plea in abatement,(b) to be answered by a replication, either denying it, which is generally the case, or setting forth some new matter to avoid it, and support the plaintiff's action, notwithstanding its truth. Thus, to a plea of *distress damage feasant*, the plaintiff may reply, that the defendant abused the distress by working it, or impounded the cattle before having the damages appraised by the fence viewers; and so in all cases where the defendant interposes a plea which justifies the trespass, and the plaintiff has matter which will either make him a trespasser from the beginning, or otherwise do away the justification, admitting its truth in the first instance, he must reply such matter specially; for if he take issue upon the defendant's plea, he cannot avail himself of the matter in avoidance thereof.(c) And so, wherever the plea is true, the plaintiff should reply the matter which avoids it, and

(x) 11 Wen. 642.
 (y) Id. Vid. 2 id. 263.
 (z) 11 Wen. 642.

(a) 9 id. 65.
 (b) Vid. ante, 690.
 (c) Vid. 1 H. Bl. Rep. 555.

leave it with the defendant to answer the replication by a rejoinder.(d) For instance, in a suit upon a chose in action, the defendant may plead a release, in the form given ante, 771 ; to this plea, however, the plaintiff in interest may reply, that the demand was assigned by the nominal plaintiff to him, and that after such assignment and notice thereof to the defendant, the assignor, the nominal plaintiff, executed the release mentioned and set forth in the defendant's plea.(e)

Sometimes, too, where the defendant has pleaded matter which will meet the declaration in its general form, and operate as a defence, the plaintiff should new assign, i. e. describe the matter which he complains of, more particularly, so as to show that the justification or defence set up in the plea, will not apply. An instance of this was given ante, 580, in an action of trespass. Another instance is, where, in an action on the case for an escape, the defendant pleads a return before suit brought, the plaintiff, if there have in fact been an escape and return before suit brought, must reply a subsequent escape, for otherwise, if he deny the plea, the issue will be with the defendant.(f) The revocation or excess of a license, must also be replied.(g) And so of the like cases.(h)

To these replications there may be a rejoinder, and we have seen how the pleadings may thus be lengthened out to a surrebutter.(i) But this is rarely necessary. In these subsequent pleadings, it is essential that the plaintiff allege matter supporting his first cause of action, and the defendant matter supporting his first matter of defence set up by his plea, and no new cause of action or defence can be insisted on. This is called a departure, and is a defect of substance, which may be taken advantage of by general demurrer.(j)

SECTION XV.

OF DEMURRERS AND ISSUES.

A demurrer is an objection either to the substance or form of the pleadings of your antagonist, whether plaintiff or defendant. It con-

(d) Vid. 1 Chit. Pl. 540.

(e) Vid. ante, 61 to 64.

(f) 1 Bos. & Pul. 413.

(g) 1 Saund. 300, a. 2 ; id. 5, conclusion of note 3.

(h) Vid. 1 Chit. Pl. 542 to 554.

(i) Ante, 579 to 581.

(j) 14 John. 152.

fesses the fact to be true, as stated in the pleading demurred to; but denies, that by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse, according to the party that first demurs.^(k) Thus, should the plaintiff in his declaration, merely state, "*that the defendant had wilfully and maliciously injured him,*" without stating *how* and *when*, the defendant may demur to this declaration. So, where the plaintiff has set forth sufficient to maintain his action, suppose the defendant should state in his plea, "*that the plaintiff had released the cause of action by him set forth,*" without showing how, the plaintiff may demur; and so, for any defect, whether in the declaration, plea, replication, rejoinder, &c.

Form of a general demurrer to a declaration.

Richard Roe ads. James Jackson.	}	The said D. says, that the said P.'s declaration is insufficient in law to maintain his action.
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This may be to any particular count or counts of the declaration, when at the same time a plea may be interposed to other counts.

The above is called a general demurrer, because it reaches to matter of substance only. If you wish to take advantage of a want of form, as the want of stating a day for instance, where the matter is in other respects sufficiently stated, you should present your demurrer in the above form, and underneath assign, or point out the particular defect of form which you object to, otherwise it cannot be noticed on the argument.^(l)

Form of assigning causes.

And for causes of demurrer, the said D. says, that the said declaration omits to state any *day* or *time*, when the said trespass therein alleged was committed.

The demurrer is then called *special*. This distinction runs through all demurrers, whether taken by the plaintiff or defendant.

Form of general demurrer to a plea.

James Jackson v. Richard Roe.	}	The said P. says, that the plea of the defendant (<i>or the 1st, 2d or 3d plea, &c.</i>) is not sufficient in law to bar the said P.'s action.
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The same form of demurrer will answer to any other pleading, substi-

^(k) 3 Bl. Com. 314.

^(l) Vid. 2 R. S. 276.

tating the words *replication*, *rejoinder*, &c. for *declaration* or *plea*, according to the pleading objected to.

When a pleading on the part of the plaintiff is demurred to, he joins issue by answering, "that the pleading demurred to is sufficient to maintain his action," or if the defendant's pleading be demurred to, he joins issue by answering, "that the pleading demurred to is sufficient to bar the plaintiff's action." This is called a joinder in demurrer; and an issue in law is then joined, to be determined by the justice only; for a jury cannot be impannelled except to try an issue of fact.(m)

Whoever commits the first substantial fault in pleading, shall have judgment against him. Thus, if a demurrer be put in to the plaintiff's replication, it avails not what faults there may be in the replication demurred to, if the plea in bar be defective in substance; for the judgment on the demurrer must be against the defendant; and so of the like cases.(n) But, though the party committing the first fault shall have judgment against him, yet this must be a fault in *substance*. Any fault of form cannot be noticed beyond the immediate plea demurred to.(o)

When a defendant demurs to a replication, and the replication is adjudged good, he is not at liberty to object to the declaration, within the above rule. But where, in such a case, the demurrer is sustained, and the plaintiff turns round and attacks the plea of the defendant, then the defendant may object to the declaration, but otherwise not.(p) So, where a defendant has pleaded the general issue, he cannot, on a demurrer to subsequent pleadings, object to the sufficiency of the declaration.(q)

Where a demurrer to a declaration is overruled by the justice, and the defendant subsequently pleads the general issue, and after verdict against him, appeals to the common pleas, that court is authorized to pass upon the validity of the demurrer, and if well taken, to give judgment for the defendant.(r)

An issue of fact is, where the fact only and not the law is disputed; as where the defendant pleads the general issue, or denies any particular fact stated in the declaration; or where a replication denies the facts stated in the plea, or a rejoinder denies the replication; and whenever, in pleading, a fact is affirmed on one side and denied on the other, it makes an issue proper to be tried by a jury,(s) within the meaning of the

(m) 18 John. 140.
(n) 2 Wils. 100. 3 id. 234. 3 T. R.
186. 1 Cowen, 316. 3 id. 96. 7 id. 46.
8 Wen. 129. 14 id. 183. 15 id. 52.
(o) 7 Cowen, 46. 8 Wen. 129.

(p) 14 Wen. 183.
(q) Id. 15 id. 52.
(r) 11 id. 545.
(s) 16 John. 267.

statute, which authorizes the justice to issue a venire on the demand of either party.^(t)

The distinction between an issue of *law* and of *fact*, and the *judgment* thereupon, is *logically* exemplified by Sir Wm. Blackstone,^(u) by the introduction of the following *syllogism* :

Against him who hath rode over my corn, I may recover damages by law ;

But A. hath rode over my corn ;

Therefore I may recover damages against A.

If the *major* proposition be denied, this is a *demurrer*, and forms an *issue of law* : if the *minor*, it is then an *issue of fact* : but if both be confessed (or *determined*) to be right, the *conclusion* or *judgment* of the court cannot but follow.

We have now closed what we had to say on the subject of pleading, the great outlines or rudiments of which ought not only to be understood by the magistrate, but adhered to by the parties ; and this, more especially, since the introduction of appeals, in causes where the amount in question will warrant that proceeding. In passing from the justice to the common pleas, the pleadings must stand or fall by their own strength, as in other actions at the common law ; and cannot have the adventitious aid of the facts proved, as upon a return to a certiorari, which has resulted in an almost unlimited intendment in favor of their validity. Nor can it be known on appeal what defects or variances, &c. were waived or passed over in silence in the court below. A little *seasonable* caution is, therefore, many times necessary to save a world of expense. These considerations will not only excuse the prolixity of this chapter, but show the necessity of examining its subject even more extensively than the limits of this treatise will warrant.

The following case should have been referred to before, under its appropriate head of *plea of title*. We accidentally omitted to notice it in its proper place ; and as it is instructive upon various points connected with the subject to which it relates, we give it at length. It may be found in 19 Wen. 128.

IN SUPREME COURT.

THE PEOPLE, on the relation of PROCTOR, vs. THE ALBANY COMMON PLEAS.

Motion for *mandamus*. *McCormick* sued the relator before a justice of the peace, and declared in trespass for breaking and entering his close situ-

(t) 2 R. S. 172, 3.

(u) 3 Bl. Com. 396.

ate in the town of Bethlehem. The declaration was general, and contained *no description of the close*. The defendant pleaded title; *McCormick* thereupon brought an action in the common pleas, and in his declaration *described particularly the close* in which the trespass was alleged to have been committed. *Proctor* moved the common pleas to set aside the declaration, on the ground of *departure* from the declaration before the justice. The motion was denied, and he now asks a *mandamus* to the common pleas requiring them to grant his application.

By the Court, BRONSON, J. When the defendant pleads title before the justice, and the plaintiff attempts to continue the proceeding, he must declare in the common pleas "for the same cause of action whereon he relied before the justice." 2 R. S. 237, § 64, (p. 168, 2d ed.) There is no proof that the cause of action on which the plaintiff relied was not the same in both courts. The declaration in the common pleas differs in *form* from that before the justice; and this must often be the case, or the pleading would be bad on demurrer. It also differs from the original declaration, in setting out the abuttals or a particular description of the close; but it does not follow that the trespass, or cause of action on which the plaintiff relies, is not the same now as it was before the justice. Whether the same or not, is a question which should be settled on motion. *Tuthill v. Clark*, 11 Wen. 642, and 12 id. 207.

It is said that the plaintiff should have new assigned before the justice. Conceding that he might have done so, yet he ought not to lose his action, because the pleadings there were less formal than is usual in courts of record. Should he go trial on the pleadings as they stood before the justice, it will be enough for the defendant to prove that he had title to any close in the town of Bethlehem; and then there must be a verdict for the defendant, although there has actually been a trespass on the plaintiff's land, and although the defendant knew what particular close was intended by the plaintiff. To avoid this injustice, the plaintiff, in declaring in the common pleas, has given a particular description of the close; and I think he should be allowed to do so, unless it appear that the cause of action is different from that on which he relied at first, or that the defendant has been misled. The defendant might have required a particular description of the plaintiff's close before putting in his plea. As he neglected to do so, and the plaintiff did not new assign, the parties ought to be allowed to put their pleadings in such form in the common pleas as will best carry out the provisions of the statute. 12 Wen. 207. The court of common pleas was right in refusing to aside the declaration. Motion denied.

CHAPTER VII.

Of Adjournments.

THE following provisions are contained in the revised statutes,^(a) and regulate the powers of justices in granting adjournments :

(§ 67.) At the time of the return of either a summons or attachment, or of joining issue without process, a justice may, in his discretion, and with or without the consent of parties, adjourn the cause not exceeding eight days.

(§ 68.) A justice shall in no case adjourn a cause commenced by warrant, on his own motion ; nor shall he exercise that right in a suit commenced by summons or attachment, at any other time than on the return of such summons or attachment. (§ 69.) At the time of the return of a summons

or attachment, or the joining of issue without process, the justice shall on the application of the plaintiff, adjourn the cause to some time to be fixed by the justice, not exceeding eight days thereafter. But such adjournment shall not be granted, unless the plaintiff or his attorney shall, if required by the defendant, make oath that he cannot, for want of some material testimony or witness, safely proceed to trial. (§ 70.) No adjournment of a cause commenced by warrant, issued at the suit of a non-resident plaintiff, shall be allowed unless in the following cases : 1. On the consent of both parties : or, 2. On the application of the defendant, supported by his oath, that he has a good defence to the action, and that he is not ready to proceed to the trial thereof ; and in such case, it shall not be granted, unless the defendant will consent that any witness on the part of the plaintiff, who shall be then attending, may be then examined on oath by such justice, his testimony reduced to writing, certified by the justice, and left with him, to be read on the trial of the cause : or, 3. On the application of the plaintiff, supported by his oath, that on account of the absence of some material witness or testimony, he cannot then safely proceed to the trial of the cause. (§ 71.) If a cause commenced by warrant, be adjourned upon the application of the defendant, he shall continue,

(a) 2 R. S. 169, 170, 171.

during the time of adjournment, in the custody of the constable, unless he shall give the security hereinafter directed to be given, in cases of adjournment. (§ 72.) If such cause be adjourned on the consent of both parties, or if it be adjourned on the application of the plaintiff, the defendant shall be discharged from custody; but the cause shall not be discontinued by such discharge; and at the adjourned day, the same proceedings shall be had, as on the return of a summons personally served. (§ 73.) The first adjournment of a cause commenced by warrant, shall be to a day not less than three, nor more than twelve days thereafter, unless the parties and justice shall otherwise agree. (§ 74.) In all cases, (other than where the suit shall have been commenced by warrant, at the suit of a non-resident plaintiff,) the cause shall be adjourned on the application of the defendant, on his complying with the following requisitions: 1. The application must be made at the time of joining issue: 2. If required by the plaintiff or the justice, the defendant shall make oath that he cannot safely proceed to trial, for the want of some material testimony or witness, to be specified by him: 3. If required by the plaintiff, he shall give security, as hereinafter directed: Such adjournment shall be for such reasonable time, as will enable the defendant to procure such testimony or witness, not exceeding ninety days. (§ 75.) In all cases, a defendant shall also be entitled to a further adjournment, upon giving security, if required, as is directed in the next succeeding section, and upon proving, by his own oath or otherwise, to the satisfaction of the justice, that he cannot safely proceed to trial, for want of some material testimony or witness. (§ 76.) The security required by any of the preceding sections to be given by a defendant, shall be a bond in the penalty of one hundred dollars, to the plaintiff in the action, with such surety as the justice shall approve, conditioned, that in case judgment shall be given against such defendant at the adjourned day, or at any time thereafter, and execution be issued against his person, he will render himself upon such execution, before the return thereof; or in default thereof, that he or his surety will pay the judgment so recovered, with interest; but if any bond shall have been given upon any prior adjournment, it shall not be necessary to execute a new bond upon a subsequent adjournment, unless such bond be required by the justice, or by the bail of such defendant in such prior bond.(1) (§ 77.) In any suit brought upon such bond, the plaintiff

(1) This section, so far as relates to the condition of the bond, applies only to cases where, by the provisions of the non-imprisonment act, an execution may issue against the body of the defendant. In all other cases, that is, in cases where no execution could issue against the body of the defendant in case judgment should be obtained against him, the condition of the bond is to

shall not be entitled to recover, unless he shows an execution upon a judgment obtained in the suit in which such adjournment was had, duly issued, within ten days after the time when by law the same could be issued, against the person of the defendant, and a return thereon that such defendant could not be found. (§ 78.) No adjournment shall be allowed, without the agreement of the parties, to a time beyond ninety days from the joining of the issue in the suit. (§ 79.) No adjournment shall be allowed in any case to a party applying therefor, who shall have seen the account or demand of the opposite party, unless such applicant, if required, shall exhibit his account or demand, or state the nature thereof, as far forth as may be in his power, to the satisfaction of the justice.

In commenting upon these provisions of the statute we shall consider, *first*, when and for what time an adjournment may be granted ; *second*, on what terms, and when security must be given, with the form of the security ; and *third*, when an adjournment amounts to a discontinuance of the suit.

SECTION I.

WHEN AND FOR WHAT TIME AN ADJOURNMENT MAY BE GRANTED.

This respects, 1. An adjournment upon the return of a summons or attachment, or of joining issue without process ; 2. Upon the return of a warrant ; 3. Other stages of the suit.

1. The *sixty-seventh* and *sixty-eighth* sections of the statute authorize the justice on the return of a summons or attachment, or on the joining of issue without process, but at no other time, to adjourn the cause, on his own motion, whether the parties consent or not, not exceeding eight days. (b) The exercise of this right is left to the discretion of the justice,

be, that no part of the defendant's property liable to be taken on execution shall be removed, secreted, assigned, or in any way disposed of, except for the necessary support of himself and family, until the plaintiff's demand shall be satisfied, or until the expiration of ten days after such plaintiff shall be entitled to have an execution issued on the judgment obtained in such cause, if he shall obtain such judgment ; and if the condition of such bond be broken, and an execution on such judgment be returned unsatisfied in whole or in part, the plaintiff in an action on such bond, shall be entitled to recover the amount due on such judgment. Vid. Laws of 1831, p. 405, § 40. Vid also 2 R. S. 203, § 299.

(b) Vid. 2 John. 192. 7 id. 529.

and is not authorized in a cause commenced by warrant, or at any other time than on the return of process. The discretion thus given to a justice, is not an arbitrary one, but ought to be soundly and judiciously exercised. And although on the one hand, he ought not to adjourn the cause on his own motion when satisfied it will injuriously affect the rights of either party, so on the other hand, he should not refuse an adjournment where the situation of either party really demands it, although he is unable to make out a case for an adjournment under the other sections of the statute. Thus, in a case under the old act, substantially like the present in this particular, where the defendant appeared before the justice on the morning of the return day of the summons, and applied in writing for an adjournment, on account of his child being dangerously ill, which was then denied, and on the same day, before the parties were called, the defendant's father appeared in his behalf to get an adjournment, and testified that the defendant's child was dangerously sick, and the justice refused to adjourn, but gave judgment for the plaintiff; the supreme court held, (the cause having come before them on writ of error,) that the situation of the defendant's child was such as ought to have induced the justice to put off the trial; and for that reason they reversed the judgment of the common pleas, which was in affirmance of the justice's judgment.(c) In computing the time for which a justice is authorized to adjourn the cause, under the sections above referred to, within the rule, ante, 262, 263, the day of adjourning is to be *excluded*, so that if the process be returnable on *Wednesday*, the justice would have no power to adjourn beyond the *Thursday* of the next week.(d) The justice cannot proceed with the trial, at a *place* different from that mentioned in the summons, unless the defendant appear;(e) but he may adjourn to another place, without the consent of parties, both parties having first appeared at the place mentioned in the process.(f) If the defendant do not appear, the justice has no right to wait two hours after the time of appearance, and then to appear himself at the place appointed and adjourn the cause.(g)

Under the *sixty-ninth* section, if the defendant do not appear at the trial on the return of the summons or attachment, the justice may adjourn the cause to a time certain, not exceeding eight days, on the simple motion of the plaintiff, without oath; and so, if the defendant do appear and does not object to the adjournment; but the defendant may

(c) 8 John. 426.
 (d) Vid. 1 Cowen, 234.
 (e) 1 John. Cas. 243.

(f) 1 Cowen, 112.
 (g) 11 John. 407.

object to the adjournment, and require, as a condition of its being granted, that the plaintiff or his attorney make oath that he cannot, for want of some material testimony or witness, safely proceed to trial. An adjournment on the application of the plaintiff, cannot be granted at any other time than on the return of a summons or attachment, or the joining of issue without process; ^(h) nor can the defendant compel the plaintiff or his attorney to disclose the nature or name of the absent testimony or witness. The form of the oath to be administered to either party on applying for an adjournment, where an oath is required, may be in the form given at the close of this head.

The adjournment, whether on the justice's own motion, or on motion of the plaintiff, must be for the next eight days immediately after the return of the process. ⁽ⁱ⁾ The adjournment may be, however, for any period within that time; but cannot exceed it, except by consent of parties. When the justice adjourns on his own motion, he may of course do so, without requiring proof of the absence of a material witness. ^(j)

In adjourning a cause, the justice must, in all cases, be present in proper person, and can never do this by sending a note in writing to the parties, informing them of the time and place to which he has adjourned. ^(k)

If the suit is commenced, in favor of a non-resident plaintiff, by short summons, as authorized by the non-imprisonment act, and the same shall be returned personally served, the same proceedings shall be had and no longer adjournment granted than in case of a warrant at the instance of a non-resident plaintiff. ^(l)

2. The provisions of the statute from section *seventy* to section *seventy-three*, inclusive, apply to adjournments in causes commenced by warrant, as well in favor of non-resident plaintiffs, as otherwise. In the former case, it will be seen that the statute points out the particular requisites to be complied with in order to authorize an adjournment. In other cases, that is, where suits are commenced by warrant, other than in favor of non-resident plaintiffs, an adjournment may be granted on the application of the defendant at the time and in the manner prescribed in the seventy-fourth section; for it will be seen that the latter section applies to all cases, except suits commenced by warrant at the suit of non-resident plaintiffs. It is also fairly inferible from the language of the seventy-second section, that the plaintiff, in a suit commenced by

(h) Vid. 9 John. 136. 7 id. 530. 2

id. 192.

(i) 7 id. 381.

(j) 9 id. 354.

(k) 4 id. 117.

(l) Laws of 1831, p. 403, § 32. Vid. also 2 R. S. 201, 202, § 291.

warrant, although he be a resident, may have an adjournment on his own application ; but in such case the defendant is to be discharged from custody. If the adjournment be granted upon the application of the defendant, he is to remain in the custody of the constable during the time of the adjournment, unless he gives the security required by the seventy-sixth section.

The first adjournment is to be not less than three nor more than twelve days, unless the parties and justice otherwise agree. This provision, which is contained in the seventy-third section, applies to all suits commenced by warrant.

3. The *seventy-fourth* section prescribes the requisites upon which an adjournment may be granted on the application of the defendant in all cases, except where the suit is commenced by warrant in behalf of a non-resident plaintiff. It will be seen that in the cases provided for by this section, the application must be made at the time of joining issue. The mode of obtaining adjournments in subsequent stages of the suit, is prescribed in the next section. The defendant must, if required by the plaintiff or justice, make oath that he cannot safely proceed to trial for the want of some material testimony or witness, to be specified by him. This oath need not necessarily be made by the defendant in person, for he may not be acquainted with the facts required to be shown in order to entitle him to an adjournment. And it is said in one case, that the defendant's agent or attorney may make the requisite oath, unless some special cause be shown against it.^(m) But in a subsequent case it is decided, that this rests in the sound discretion of the justice ; and that unless it appear that the defendant cannot attend, the oath of an attorney or third person *may* be refused.⁽ⁿ⁾ It is hardly to be supposed that the inability of the defendant to attend, must, in all cases, be shown to authorize a justice to grant an adjournment upon the oath of a third person. Cases frequently arise in which a defendant is totally ignorant of the facts which go to establish his defence ; for instance, where the suit is against him, as principal, for some act of his agent, committed in the absence and without the knowledge of the defendant. And this right of the justice to adjourn, should, in most cases, be liberally exercised ; and he would hardly be considered as abusing the discretion vested in him, should he grant an adjournment upon the oath of an attorney, to whom the defendant had entrusted the management of his cause, and to whom also he had communicated the facts going to make out his defence, with the

(m) 1 John. 514.

(n) 13 Id. 228.

names of the witnesses; and this, although the defendant might be able to attend in person. An adjournment after joining issue is so much a matter of course in litigated causes, that a strict compliance with the letter of the statute in this respect should not, except in extraordinary cases, be exacted. The parties, in nine cases out of ten, make no preparation for trial until after issue joined; for until that time, neither of them can legally know what will be the claim or defence of his antagonist; and hence the statute does not require that either party, in order to obtain an adjournment, in the first instance, should show that he has used any effort to procure his witnesses.(o)

The absent testimony or witness must be specified by the defendant, if he is required to do so by the plaintiff or justice. He is not bound to detail *all* the testimony or the names of *all* the witnesses; it is sufficient to give the name of one absent material witness, without whose testimony he cannot safely proceed to trial. By doing this, he makes out a case for an adjournment, and that is all that can be required of him. Any other rule would impose a great hardship upon the defendant. If he refuses to name his witness, or to state where he resides, the adjournment may be denied.(p)

In addition to the requirements of the statute already mentioned, the defendant must, if required by the plaintiff, give such security as we shall hereafter notice. Unless he gives this security, although in other respects he complies with the provisions of the statute, no adjournment can be granted, but the justice should proceed with the trial of the cause. If security is demanded, the justice ought to give the defendant a reasonable time to obtain a surety, and should, in the mean time, hold open the cause.

The time of adjournment is, in no case, except by consent of parties, to exceed ninety days, and is to be for such reasonable time as, in the opinion of the justice, will enable the defendant to procure his absent testimony or witness. What is a reasonable time, is left to the discretion of the justice. If the witness reside at a distance, ample time to see him or communicate with him should be given to the defendant, and the adjournment should not be restricted to the shortest possible time that would ordinarily be required to procure his attendance. The probability of his being absent from home, engaged in business, sick, &c. should all be taken into account, and such time given, as may, under all the circumstances, be considered reasonable. It is the common practice, where

(o) Vid. 9 John. 364. Id. 133, 4.

(p) 15 John. 43.

the absent witnesses reside in the same town, to grant an adjournment for a week ; but this practice should not in all cases be followed ; for instances are by no means rare where a delay of trial for that time would be extremely injurious to the interests of plaintiffs. Upon a suggestion, therefore, of any circumstances going to show that there would be danger in delaying the judgment, the justice should adjourn for a shorter period, having regard to the time necessary for the defendant to procure his witnesses. The fact that the witness resides out of the jurisdiction of the court, forms no ground for refusing the adjournment ; for the defendant must take his chance of procuring his attendance in season.(1)

The *seventy-fifth* section authorizes the justice to grant a *further* adjournment, on the application of the defendant. This can never be done on the application of a plaintiff, except, perhaps, where a commission is applied for and issued under the act of 1838 ;(q) and even in that case, the delay necessary for the return of the commission is to be considered rather in the light of holding open the cause than an adjournment, especially if issued on the application of the plaintiff. But more will be said on this subject hereafter. That the plaintiff was not, under the old justice's act, (and the revised statutes have not altered the law in this particular,) entitled to a second adjournment, *vid.* 15 John. 492. And so strictly is this rule adhered to, that in one case, where the plaintiff, after one adjournment by consent, stated to the justice that the defendant had agreed to adjourn, and then made oath of the absence of a material witness on his own part, the defendant not appearing, this was held irregular, and the judgment reversed.(r) A still stronger case was, where the parties adjourned by consent, and both appeared at the adjourned day, and the plaintiff showed cause on oath, that he had a material witness absent, whom he had been unable to procure, but without whose testimony he could not safely proceed to trial ; in this case, though perfect justice was done, in giving judgment for no more than the defendant admitted to be due, yet, because the justice granted the adjournment, the judgment was reversed.(s) This authority to grant a further adjournment on the defendant's application is given to the justice in all cases, even when the suit is commenced by warrant at the suit of a non-resident plaintiff ; for the section contains no exception, but applies, in express terms, to *all cases*. In order to make out a case for a second or further adjournment, security must be given, if required, and the defendant must, in addition, prove by his own oath, or otherwise, to the satisfaction

(1) 2 John. 383.
(q) *Vid.* Laws of 1838, p. 222.

(r) 8 John. 291.
(s) 15 John. 492.

of the justice, that he cannot safely proceed to trial, for want of some material testimony or witness, and that he has used due diligence to obtain such testimony or witness. If security has been given by the defendant, at any previous adjournment of the cause, no new bond can be required at any second or subsequent adjournment, as will be seen by a reference to the seventy-sixth section, unless such bond be required by the justice, or by the bail in the prior bond.

It is not enough, on this application for a further adjournment, that the defendant's testimony or witness is absent. He must prove, in addition to this fact, that he has used *due diligence* to obtain the absent testimony or witness, and has been unable to do so. And even though the first adjournment was granted on the application of the plaintiff, or on the justice's own motion, still, unless the defendant shows due diligence, the justice may refuse a second adjournment on his application.^(t) The reasoning of the court in *Powers v. Lockwood*,^(u) seems to apply as well to the case of an adjournment at the plaintiff's as the defendant's request, though that was a case where the *defendant* had applied for the first adjournment. "There must," say the court, "be some reasonable limitation to the time of the application, and of which the court is to judge. After one adjournment, at the request of the defendant, to enable him to prepare for trial, it would be vexatious to allow him another on the usual affidavit, and without showing any diligence in the meantime. The first adjournment applied for by the defendant, was for time to prepare for trial, and was a substitute for an adjournment on affidavit and security. Both the witnesses, whose names were given by the defendant, lived within four miles of the court. The defendant is always entitled, as of right, to one adjournment, to procure testimony on making the requisite oath; but if he neglect to take out *subpœnas*, or make any effort to procure his witnesses after issue joined, and after an adjournment on his own motion, he ought not, in reason and justice, to be entitled to a farther adjournment, without some special cause shown for the non-attendance of his witnesses, or for the adjournment. On the adjourned day after issue joined, the plaintiff is supposed to appear with his proof, and the jury to appear upon the *venire*, (*in that case a venire was issued*;) and it would be an abuse for a defendant to be entitled, as of course, to another adjournment to procure his testimony, without having taken any one step towards it in the meantime, or shown any one reason why he has omitted to do it. The statute could not have intended to help a party in his wilful negligence." On the other hand, where the defendant shows that

(t) Vid. 9 John. 364.

(u) Id. 133.

he has subpoenaed a material witness, who does not attend, and that without such testimony he cannot safely proceed to trial, or any other reasonable excuse for not being ready, the justice is bound to grant the adjournment, and if refused, it is an error for which the judgment will be reversed.(v) Indeed, in *Beekman v. Wright*,(w) the report says, that the cause had been adjourned, on the defendant's application, from the 30th March to the 2d of May, upwards of a month, "*on giving security, &c.*" by which I understand on *oath* also, (and which no doubt must have been made in that case, from the length of time for which the adjournment was granted,) the court say, "the justice should have granted a further adjournment, on the defendant's making oath that he had subpoenaed his witness, who was material and did not attend;" and because a second adjournment was refused, the judgment was for this, among other reasons, reversed. It appears from this case, and such is the law since the revised statutes, that a justice may adjourn from time to time, and more than once, on the defendant's making the proper oath and giving security, confining himself, however, within the boundaries of the ninety days, which his adjournments in the aggregate cannot exceed, except by consent of parties.(x) The justice has no right to refuse the adjournment, in these or any other cases, where it is matter of right, because the party applying refuses to pay the costs of a venire, or other costs in the cause.(y) And whether a justice's court has in any case a right to impose the condition of paying costs, where an adjournment is granted? *Quere.*(z) In 3 *Wen.* 420, it was held he had no right to deny an adjournment, because the defendant refused to pay his fees for drawing a bond.

Nor is it a reason for not adjourning on good cause shown, that the parties had themselves agreed on and fixed the day of trial.(a) On this subject, the case of *Smith v. Fenton*,(b) is in point. We cite the case at large. It came before the supreme court on certiorari. "Fenton sued Smith in the court below, and after issue joined, the cause was twice adjourned by consent. The second adjournment was under a stipulation of the defendant that he would not delay the trial farther, but would absolutely come to trial on the 17th January, 1823, the last adjourned day. On that day the parties appeared, and the defendant requested a further adjournment, offered security, and to make oath of the absence

(v) 11 *John.* 442. 9 *id.* 364. 13 *id.* 462.

(w) 11 *id.* 442.

(x) *Vid.* 3 *id.* 425, 6.

(y) 9 *id.* 364. 11 *id.* 442.

(z) 11 *id.* 442. 9 *id.* 364. 3 *Wen.* 420.

(a) 13 *John.* 462.

(b) 2 *Cowen*, 425.

of two material witnesses, who had been subpœnaed by him, but did not attend ; that without their testimony he could not proceed to trial, as he was advised by counsel ; that one of them had gone a journey ; that he expected to procure their attendance in two or three weeks. The justice denied the adjournment. Judgment for the plaintiff.

“Curia. The spirit of the twenty-five dollar act, and the adjudications of this court upon it, appear to be, that the justice has a discretion in granting adjournments after the first. One adjournment the defendant may claim as matter of right, on giving security, and making oath of the absence of a material witness. Others he may be entitled to on showing sufficient cause ; provided the three months have not expired. In this case the two first adjournments were by consent ; and though the defendant might have been guilty of a violation of good faith, yet he offered to comply with the requisitions of the act. There had been no laches on his part ; for he had subpœnaed his witnesses, and they did not attend. We think the justice ought to have granted the adjournment ; though he seems to have acted under the impression that the defendant's object was delay and vexation. *Easton v. Coe*, 2 John. 383. *Townsend v. Lee*, 3 id. 431. *Powers v. Lockwood*, 9 id. 133. *Beekman v. Wright*, 11 id. 442. *Annin v. Chase*, 13 id. 462.”

An agreement before the justice, that the cause shall be adjourned a given number of days, and that then, if a certain person, naming him, do not attend as a witness, the justice may adjourn for such reasonable time as he may deem necessary to procure the attendance of the witness, is a valid and binding agreement, and cannot be revoked without the consent of both parties. If such an agreement do not provide that security shall be given, the justice may adjourn without requiring security, this being waived by the silence of the parties.(c)

Where the defendant applies for an adjournment, the plaintiff has no right to require him to state what he expects to prove by his absent witness. But in one case, where he did do so, and the plaintiff agreed to admit what the defendant said he wished to prove by him, and the defendant at first acceded to this proposition, and said he would go to trial, but afterwards insisted on a further admission, which the justice thought unreasonable, and refused the adjournment ; this was held right, and the court remark, generally, in giving their opinion on this case, that “if the plaintiff will admit the testimony, no time can be wanted to procure witnesses.”(d) A simple admission, however, that the witness, if present,

(c) 1 Cowen, 255.

(d) 14 John. 341.

would testify to what the defendant swears he expects to prove by him would be no answer to the application for an adjournment. The admission should be unqualified, that what the defendant expects to prove is true.(e)

A party has no right to apply for an adjournment after the jury are sworn ;(f) nor after a trial has begun before the justice.(g) But the justice may, in these cases, hold his court open for a short time, (and in one case it was held that two hours was not unreasonable,) to enable a party to procure a material witness ; and this was held right, even after a jury had been empannelled and balloted. It was further said by the court, that this matter rested in the sound discretion of the justice, and unless he had abused his discretion, it was no reason for reversing the judgment ;(h) but twenty hours, to enable the defendant to obtain a witness twelve miles off, was held unreasonable, and the judgment reversed.(i) And a justice may even keep his court open till the next day, where a delay in summoning a jury or other exigency, renders this necessary ;(j) and so the trial of a cause may be postponed, on account of the justice being engaged in the trial of other causes, and, indeed, in any case where such delay is reasonably accounted for.(k)

Adjournments may also be made, from the necessity of the case, under circumstances not expressly provided for by statute. Thus, where an attachment is issued against a witness, or a new venire is issued, the justice may, without doubt, adjourn or hold open the cause to such time as will be reasonable for the return of the attachment or venire. A provision is also contained in the statute,(l) for adjourning a cause where a material witness refuses to testify, &c. and is committed to jail.(m) So, also, where a commission is issued to examine a foreign witness, the cause may be adjourned for the time necessary to obtain the execution and return of the commission.(n) In none of these cases, however, should the adjournment exceed ninety days.

Before the revised statutes, it was held that, in general, where the time of appearance was appointed by the justice, either in the summons, &c. or by adjournment, the party was bound to wait only a reasonable time ;(o) and in one case, where the justice being absent, the party waited nearly three hours after the time, and then went away, it was held too

(e) Vid. 7 Cowen, 369.

(f) 8 John. 437.

(g) Griffith's Treatise, 80.

(h) 8 John. 409.

(i) 13 id. 469.

(j) 2 Caines, 134.

(k) 12 John. 217. 10 Wend. 102.

(l) 2 R. S. 200, § 279, 280, 281.

(m) Vid. Edw. Treat. 3d ed. 76.

(n) Laws of 1838, p. 232.

(o) 5 John. 353.

late to proceed.(p) But in another case, where the defendant appeared at the time, and waited till the justice came, which was about an hour, and then urged the justice to call the cause, who refused to do so, and waited about twenty minutes, till the plaintiff came, and then told the defendant he should proceed, which he did do, this was held well.(q) It is now provided by statute, as we saw ante, 526, that on the return of a summons personally served, or of an attachment duly served, the justice is bound to wait one hour after the specified time of return, before he proceeds with the cause, unless the parties sooner appear. We cited, ante, 526 to 531, some cases in which this rule had been relaxed in favor of parties neglecting to appear within the precise limit of time fixed by the statute. In addition to the cases there cited, it is proper to notice in this connexion, the case of *Jenkins v. Brown*, 21 Wend. 454, reported since the preceding pages were put to press. In that case the supreme court hold, that a justice may, *in his discretion, upon terms*, permit a defendant to come in and plead, who did not appear on the return of a summons personally served, but subsequently appears on the day to which the cause is adjourned at the request of the plaintiff.

In one case, a delay after the return of a summons for more than two hours, within which time the defendant appeared, but departed before the justice arrived, was held a discontinuance of the suit ;(r) but where a party consents that the justice may absent himself on business, instead of proceeding with the trial of a cause, this takes away all error as to the party consenting.(s)

FORM OF THE OATH ON AN APPLICATION TO ADJOURN.

You do swear that you will true answers make, to such questions as shall be put to you, touching the necessity of an adjournment in this cause.

FORM OF TAKING AND CERTIFYING THE EXAMINATION OF A WITNESS, ON the application of a defendant to adjourn, in a cause commenced by warrant, at the suit of a non-resident plaintiff.

JUSTICE'S COURT.

James Jackson }
vs. } Before JOHN B. GILBERT, Esq. one of the justices of the
Richard Roe. } peace in and for the county of Saratoga.

Saratoga County, ss. John Doe, a witness attending, produced and sworn by and on behalf of the plaintiff in this cause, being duly sworn,

(p) 5 John. 353.
(q) 15 id. 496.

(r) 11 id. 407.
(s) 15 id. 504.

on his direct examination deposes and says. (*Here insert the testimony of the witness on the plaintiff's examination.*) The said *John Doe*, on his cross-examination by the defendant, further deposes and says. (*Here insert the testimony on the defendant's examination. If there is a re-examination, further cross-examination, &c. state the fact in the above form.*)

JOHN DOE.

*Sworn before me this 5th }
day of November, 1840. }*

JOHN B. GILBERT, *Justice of the Peace.*

I certify that *John Doe*, the witness above named, was in attendance before me at the joining of issue in the above entitled cause, on this 5th day of November, 1840, and that at the plaintiff's request and by consent of the defendant, the said witness did then testify to the facts contained and set forth in the above affidavit.

JOHN B. GILBERT, *Justice of the Peace.*

SECTION II.

OF THE TERMS ON WHICH AN ADJOURNMENT MAY BE GRANTED.

WE have already noticed, among other things, when an oath is necessary in order to obtain an adjournment, what must be stated under that oath, and by whom, with the form of the oath, and whether a justice may impose the terms of paying costs in any case.

1. Another condition of adjourning, in all cases, is that the party applying, whether plaintiff or defendant, who shall have seen the account or demand of the opposite party, shall, if required, exhibit his account or demand, or state the nature thereof, as far forth as may be in his power, to the satisfaction of the justice.^(t) It was formerly supposed that this provision of the statute, in connexion with the further statutory provision investing justices with power to hear, try and determine the causes within their jurisdiction, and for that purpose, where no special provision is otherwise made by law, conferring on them all the necessary powers which are possessed by courts of record,^(u) gave to the justice the power of exacting a bill of particulars from the party asking an adjournment after

^(t) Vid. ante, 836, § 79. Vid. also 2 (u) 2 R. S. 158, § 1.
R. S. 171, § 79.

having seen the account or demand of his antagonist. This bill of particulars is, in courts of record, procured for the benefit of the party asking it, and forms a part of the declaration, plea or notice, and, on the trial, the party furnishing it, is not allowed to give evidence of any items not contained in the bill. It seems, from the decision of the supreme court upon this question,^(v) that no such power is possessed by justices' courts, and that the only object of the seventy-ninth section of the statute, is to satisfy the justice as to the propriety of granting the adjournment asked for, and that it was not intended for the benefit of the parties, so far as regards the question of set-off at the trial. We alluded to this subject, ante, 756, 7, so far as relates to the degree of particularity required in a plea or notice of set-off, and concluded that nothing more than the general form was, in such case, necessary. A different question now presents itself. What particularity is requisite under the section we are now considering? Certainly something more than the general language of a plea or notice of set-off; otherwise there would be no need of the provision. This question is answered by the case of *Harrington v. Ensign*, 11 Wen. 554; cited ante, 756, 7. That case, which we shall presently give at large, settles the question that a party is not bound to confine himself, on the trial, to the proof of such items of his account or demand as are stated or furnished by him on the application for an adjournment. He is not bound by the statement, as he would be if furnished by way of a bill of particulars in a court of record. The specification is made merely to satisfy the justice that an adjournment is proper and does not respect the question of set-off upon the trial. But we will allow the case to speak for itself.

IN SUPREME COURT.

HARRINGTON AND WIFE vs. ENSIGN.

"Error from the Washington common pleas. Ensign sued Harrington and wife in a justices' court, and declared against them on a promissory note made by the wife *dum sola*. The defendants pleaded the general issue, and gave notice of set off, for goods, wares, and merchandize, and for money had and received, and asked for an adjournment. The plaintiff exhibited the note declared on, and stated that on the trial he should rely upon it for a recovery, and demanded that before an adjournment should be granted, the defendants should exhibit a bill of particulars or state the particular items of their set off. The defendants, in consequence of the justice ruling that they were bound to do so, then stated

(v) 11 Wen. 554.

that their demand was for grain, for hides and for board, amounting to \$50. The cause was then adjourned to a day agreed upon by the parties. After the adjournment, a conversation was had between the counsel for the plaintiff and Harrington, in the hearing of the justice, in which Harrington alleged that he had an account against the plaintiff for a stove, that he intended to bring in on the trial of the cause. The plaintiff's counsel told him if he had such account, he ought to have specified it in his bill of particulars demanded before adjournment, and that he should object to its admissibility upon the trial. On the trial, after the plaintiff had proved the note declared on, the defendants offered to prove the sale of the stove by them to the plaintiff, which evidence was objected to by the plaintiff, and rejected by the justice, who rendered a judgment in favor of the plaintiff. The defendants removed the cause into the Washington common pleas by *certiorari*, where the judgment of the justice was affirmed. The defendants sued out a writ of error.

"*By the Court*, SAVAGE, Ch. J. It is said that justices are invested with power to hear, try and determine the causes within their jurisdiction; and for that purpose, where no special provision is otherwise made by law, they have all the necessary powers which are possessed by courts of record in this state. 2 R. S. 225, § 1, (p. 158, 2d ed.) This is not a new power; it will be found in the revised laws of 1801 and 1813, and in the act of 1824; and the argument in favor of the power assumed in this case, was supposed to be strengthened by the 79th section of the revised statutes, 2 R. S. 240, (p. 171, 2d ed.) which says that no adjournment shall be allowed in any case to a party applying therefor, who shall have seen the account or demand of the opposite party, unless such applicant, if required, shall exhibit his account or demand, or state the nature thereof as far forth as may be in his power, to the satisfaction of the justice. But this same provision is found in all previous revisions of the statutes. In this respect the powers of justices are the same they ever have been, and are not enlarged by the revised statutes. The provision, I apprehend, has nothing to do with the question of set off upon the trial. At the time when the exhibit is required, the sole question before the justice is, the propriety of granting an adjournment; hence the party is to set forth the nature of his demand, to the satisfaction of the justice, who is to be reasonably satisfied that the party has good grounds for asking for an adjournment: that the witnesses stated to be absent are necessary to support a *bona fide* demand which the party has, or at least supposes he has, and that injustice may be done if he is driven to a trial *instante*, without an opportunity to support his claim. This is the whole object

of the provision in question ; and when the adjournment was granted, the object was attained, and the parties upon the trial were thrown upon the issues joined by the pleadings. If an adjournment had not been asked for, it could not be pretended that the 79th section would give countenance to the power exercised by the justice in asking a bill of particulars. The power, therefore, must rest upon the first section, or some other section of the statute. The legislature have said what a defendant must do, to entitle himself to the benefit of a set off. The fifty-first section says, that 'to entitle a defendant to a set off, he must plead or give notice of the same, specifying the nature of his claim with reasonable certainty, at the time of joining issue on a question of fact upon the merits of the cause.' Not that he shall give a particular of his demand, and insert every item, or be precluded upon the trial. It is true that such a power might be very convenient in some instances, but it is also true, that in justices' courts, where suitors are supposed to conduct their own causes, great injustice might be done by introducing a system of practice which suitors generally are ignorant of. That it was intended that there should be more certainty than a mere general notice contains, I think is clear from the phraseology of the act, particularly when compared with the statute of set offs in courts of record. 2 R. S. 355, (p. 278, 2d ed.) 'To entitle a defendant to a set off, he must plead or give notice of the same.' This is all the legislature say about it, and leave to the practice of the courts to regulate the particulars ; but when speaking of the same subject in a justice's court, it is said not only that the defendant must plead or give notice of the same, but it is added, that he shall specify the nature of his claim with reasonable certainty. He is not bound, then, to give a formal bill of particulars, but he is required to specify the nature of his claim with reasonable certainty ; it must be so specific that the plaintiff shall not be surprised upon the trial by any demand not embraced within the plea or notice ; and as there is no pretence of surprise in this case, I am of opinion that the judgment of the common pleas and of the justice ought to be reversed."

2. Another condition to be complied with by the defendant, to obtain an adjournment, is that of giving security. This security must be given, where the adjournment is in a cause commenced by warrant, in order for the defendant to obtain a discharge from custody.(w) In all other cases, (except actions commenced by warrant at the suit of non-resident

(w) Vid. ante, 886, 887, § 71.

plaintiffs,) the security need not be given, unless expressly required by the plaintiff; and if he is silent, or says nothing about exacting security, none need be given, and the adjournment should be granted without it.(x) In all cases, the security to be given should be in the form of a bond, and although the cause be commenced by warrant, and the defendant be discharged from custody on the adjournment, still the same proceedings are to be had on the adjourned day as on the return of a summons personally served, that is, the justice may proceed with the cause whether the defendant appear or not.(y)

FORM OF BOND ON ADJOURNMENT :

Proper in all cases in which executions may be issued against the body.

We *Richard Roe* and *John Doe*, of *Saratoga Springs*, in the county of *Saratoga*, acknowledge ourselves indebted to *James Jackson*, in the sum of one hundred dollars, which we bind ourselves jointly and severally to pay. Sealed with our seals, and dated the fifth day of November, 1840.

Whereas a suit has been commenced before *John B. Gilbert, Esq.* one of the justices of the peace of the said county, by the said *James Jackson*, plaintiff, against the above bounden *Richard Roe*, defendant, of a plea of trespass, (*state the nature of the plea*), and now upon the application of the said defendant, the trial of said cause is adjourned until the 12th day of November inst., at one o'clock in the afternoon, at the dwelling house of the said justice, in the said town :

Now, therefore, the condition of this obligation is such, that in case judgment shall be given against the said defendant at the said adjourned day, or at any time thereafter, and execution be issued against his person, the said defendant shall render himself upon such execution before the return thereof; or, in default thereof, if the said defendant or his surety, the said *John Doe*, shall pay the judgment so recovered, with interest, then the above obligation to be void, otherwise of force.

RICHARD ROE, (L. s.)

JOHN DOE, (L. s.)

Sealed and delivered in presence {
of, and the surety approved by }

JOHN B. GILBERT, *Justice of the Peace.*

(x) Vid. ante, 837, § 74.

(y) Id. § 72.

ANOTHER FORM OF BOND ON ADJOURNMENT :

Proper in all cases in which executions against the body cannot be issued.

(The penalty and recital are the same as in the next preceding form, but the condition is as follows :)

Now, therefore, the condition of this obligation is such, that if no part of the property of the above bounden *Richard Roe*, liable to be taken on execution, shall be removed, secreted, assigned, or in any way disposed of, except for the necessary support of himself and family, until the said plaintiff's demand shall be satisfied, or until the expiration of ten days after said plaintiff shall be entitled to have an execution issued on the judgment obtained in said cause, if he shall obtain such judgment, then this obligation to be void, otherwise of force.

RICHARD ROE, (L. s.)

JOHN DOE, (L. s.)

Sealed and delivered in presence }
of, and the surety approved by }

JOHN B. GILBERT, *Justice of the Peace.*

The liability of the obligors upon either of these bonds, depends upon the diligence of the plaintiff in obtaining his execution upon the judgment. This he must do within ten days after the execution becomes due. No recovery can be had upon the bond, the form of which is first above prescribed, unless the execution is issued within the ten days ; and unless, in addition, there is a return upon it that the defendant could not be found.(z) In the second case, that is, where the execution does not issue against the body, the liability of the surety would seem, from the language of the bond itself, to be discharged, unless the execution is issued within the ten days. It may, however, be thought questionable, whether a plaintiff might not sustain an action upon the bond, without suing out an execution at all, in case he could show a breach of the condition before the expiration of the ten days. For instance, suppose the defendant disposes of all of his property before the execution becomes due, or before the ten days have elapsed. In such a case, the issuing of an execution would be a mere matter of form, as there would be no property upon which to levy, in order to satisfy it. The difficulty, however, in such a case, would be, to prove the fact that there was no property remaining in the hands of the defendant upon which a levy might be made. A fact to which no one would perhaps be able or willing to at-

(z) Ante, 887, 8, § 77.

test. Beside, it is not necessary that there should be enough property left to satisfy the execution in full, for the surety is entitled to the benefit of a levy upon what remains, as far as it goes in extinguishment of the judgment. Now, by procuring his execution, the plaintiff is enabled to obtain the return of a constable as to whether or not the defendant has any property; which return, in an action upon the bond, would at least be *prima facie* evidence of the facts stated in it. And indeed, it is by no means clear, that this is not the only way in which the fact can be legally ascertained. It would therefore be the safer course, in all cases, for the plaintiff to see that his execution is put into the hands of a constable before the expiration of the ten days after the time when by law it may be issued.(1)

If the surety offered, pass without objection from the plaintiff, he is received of course. If objected to, the justice may and should require an affidavit of justification in double the penalty of the bond.

The surety may be opposed, on the ground that he is embarrassed in his circumstances; or about to leave the county; or that he has been bail before, without knowing in how many actions, or for what sums; or on other grounds calculated to excite suspicion, that he might be unable to meet the demand.(a) To ascertain these facts, the surety, after swearing to a round sum, sufficient in the first instance to establish his competency, may be cross-examined on oath, (the form of which I shall give,) by the party or counsel opposed to his principal. The justification may be by the following affidavit:

FORM OF AN AFFIDAVIT OF JUSTIFICATION OF BAIL.

Richard Roe } Before *John B. Gilbert*, Esq. one of the justices of the
ads. } peace of the county of Saratoga.
James Jackson.

SARATOGA COUNTY, ss.—*John Doe*, being duly sworn, says that he is a house-keeper, (or *freeholder*,) now actually resident in the town of Saratoga Springs, in the said county; and that he is worth two hundred dollars, over and above what will pay all his debts.

JOHN DOE.

Sworn the 5th day of November, }
1840, before me, }

JOHN B. GILBERT, Justice.

(1) Vid. the following cases relating to the liability of sureties upon bonds given on adjournments, under the acts in force previous to the revision: 1 Cowen, 99; id. 241; id. 246; id. 253; 1 Wen. 464.

(a) Tidd, 229, 230.

If the party interested wish to interrogate the bail further, he may be sworn as follows :

FORM OF THE OATH.

You swear that you will true answers make to such questions as shall be put to you, touching your competency as surety for *Richard Roe*, on his application to adjourn this cause.

The entire justification may be taken on the above oath, without the affidavit, if thought best ; but as the magistrate would be amenable for *gross neglect* in this matter, and as the examination on oath would doubtless exculpate him on a charge of this kind, it might be better, sometimes, to preserve the justification in the shape of an affidavit, for the greater ease of proof.

SECTION III.

WHEN AN ADJOURNMENT AMOUNTS TO A DISCONTINUANCE OF THE SUIT.

An adjournment improperly made, is a discontinuance of the suit.(b) This was held in several of the cases which I have cited, under the two previous heads of this chapter : As where the justice sent a note in writing to adjourn the cause,(c) or adjourned on the plaintiff's oath of the absence of a material witness, accompanied with his statement, that the defendant had agreed to the adjournment ;(d) so where the court was held open twenty hours, for the defendant to obtain his witness ;(e) and where the party waited nearly three hours after the time appointed, and then went home, after which the justice came and rendered judgment.(f) In addition to these cases, it has been held that an adjournment by agreement of parties, in the absence of the justice, is not enough, although subsequently entered by him on his docket ; and if, in such a case, the defendant do not appear at the time to which the cause is thus adjourned, and judgment is rendered against him, it will be reversed.(g)

(b) 2 John. 192.
(c) 4 id. 117.
(d) 8 id. 391.

(e) 13 id. 469.
(f) 5 id. 353.
(g) 10 Wen. 497.

But where the justice has a discretion in adjourning a cause, nothing but an abuse of his discretion will be regarded as error.(h) In general, if the party who objects to an adjournment, appear and go to trial, it is a waiver of the irregularity ; and he cannot take advantage of it on certiorari ;(i) though it is otherwise where an adjournment is refused.(j) Nor can the party who obtains an irregular adjournment, object that it is error ;(k) and if one party request, or consent to an adjournment, and the other make no objection, the adjournment will be deemed by consent of parties.(l) And where, after an improper adjournment, the defendant confesses judgment, this is a waiver of the irregularity.(m)

(h) 8 John. 391.

(i) 7 id. 381. 9 id. 136.

(j) 7 id. 383, *per cur.*

(k) 3 Caines, 166.

(l) 7 John. 529.

(m) 11 id. 461.

CHAPTER VIII.

Of Trial, and its Incidents.

SECTION I.

OF PREPARATION FOR TRIAL.

1. To compel the attendance of witnesses, and the production of the necessary papers in their hands, the party may obtain, either from the justice who tries the cause, or from any other justice, (a) a subpoena to testify, or to produce the paper as evidence in the cause, or both. (b)

FORM OF SUBPENA TO TESTIFY.

SARATOGA COUNTY, ss. To JOHN STYLES and THOMAS NOAKES, GREETING. In the name of the people of the state of New-York, you are commanded to appear personally before me, the undersigned, a justice of the peace of the said county, at my dwelling-house in the town of Saratoga Springs, in said county, on the twelfth day of November inst., at one o'clock in the afternoon, to testify the truth according to your knowledge, in an action now pending before me the said justice, and then and there to be tried, between *James Jackson*, plaintiff, and *Richard Roe*, defendant, (c) on the part of the plaintiff, in a plea of *trespass on the case*. (d) Hereof fail not at your peril. Given under my hand at the said town of Saratoga Springs, this 5th day of November, 1840.

JOHN B. GILBERT, Justice.

The above is called a *subpœna ad testificandum*. If either of the witnesses are required to produce some paper, or other evidence in his possession, add a clause as follows : it is then called, in respect of this clause, a *subpœna duces tecum* :

(a) 2 R. S. 171, § 80.

(b) 1 Phil. Ev. 7th Lond. ed. p. 3.

(c) Preserve the character of the parties as ante, 456, 7.

(d) Vid. ante, 458, 9.

And you, the said *John Styles*, are further commanded to bring with you, and then and there produce in evidence, a certain agreement in writing, (or *promissory note, &c. according to the case,*) lately left in your hands by the said parties, and all deeds, evidences and writings, which you have in your custody or power concerning the premises.

General words in a clause of this kind, as for instance, "to produce all letters, papers and documents touching or concerning the matter in dispute," cannot be relied on. The paper should be described. Such a general notice to an attorney given with a view to elicit a letter in his hands, was held insufficient.(e)

This clause is inserted immediately after the words *trespass on the case*, or other words stating the plea, in which the witness is subpœnaed to testify. The subpœna may contain as many names as the party may wish to have inserted; and there is no impropriety in the justice inserting the name of one witness and permitting the party to insert such others as he may please. So where a witness has been duly subpœnaed, his name may be inserted at any time afterward.(f)

The above form applies to cases in which the cause is pending before the justice who issues the subpœna. If the party wishes to obtain a subpœna in a suit pending before another justice, the person applying must prove by his own oath, or the oath of some other person, that such suit is actually depending before such other justice. The oath to be administered in such a case may be in the form prescribed ante, 784, for obtaining a subpœna in a cause before arbitrators. The subpœna in the latter case may be in the form above given, substituting for the words "*before me the undersigned,*" the words "*before Ransom Cook, Esq.*" and also substituting the words "*his*" and "*him*" in the place of "*my*" and "*me*."

2. The subpœna may be served, either by a constable, or any other person; and is to be served by reading the same, or stating the contents to the witness, and by paying or tendering the fees allowed by law for one day's attendance.(g) This service must be personal, on the witness, and in reasonable time before the hour of trial, that he may suffer the less inconvenience from his attendance on the court.(h) And it has been held that notice to a witness in *London*, at 2 P. M. requiring him to attend the sittings at Westminster, (in the same city,) in the course of the same evening, was too short.(i) The witness is entitled to a reasonable

(e) Ry. & Moody's N. P. Cas. 341.

(f) Holt's N. P. R. 520.

(g) 2 R. S. 171, § 82.

(h) 1 Str. 509. Penning. on Small Causes, 143.

(i) 2 Tidd's Prac. 807. 5th ed. And vid. 1 Marsh. 410.

time for travel, availing himself of the ordinary modes of conveyance, and cannot be required to travel on Sunday.(1) If the witness be a married woman, still the subpoena must be served upon her personally, and a tender of witness' fees made to her, and not to her husband.(j) In *Bell v. Vincent*,(k) it was held that the service of a copy of a bill of Middlesex, by placing it on the defendant's shoulder, after he had refused to take it, was a good service. Within the principle of that case, (every thing having been done which the person making the service could do,) there can be no doubt that if the witness should attempt to evade the hearing of the subpoena by going away or otherwise, still the service would be good.(l)

No witness is bound to appear except his regular fees be tendered to him at the time of serving the subpoena, nor if he appears is he bound to give evidence, till such fees are actually paid or tendered.(m) The amount of such fees to a witness from the same county is twelve and a half cents, and to a witness from any other place than the same county, twenty-five cents for every day's actual attendance.(n) Where one party has subpoenaed a witness, and paid him his fees, the opposite party, on subpoenaing the same witness, is excused from making him any tender; and it has been determined in one case, that if such tender be made and the witness receive the money, concealing the previous payment from the party, it may be recovered back, in an action for money had and received, on the ground of the fraudulent concealment.(o)

How a tender is made, and when waived by the conduct of the party, *vid. ante*, 794 to 802.

It has been held that a person is not compellable to be examined as a witness, until duly subpoenaed, though he stand by in court during the trial. Such is doubtless the law; for until regularly subpoenaed, he is a mere stander-by.(p)

A subpoena issued by a justice is valid to compel the attendance of a witness being in the same county where the cause is to be tried, or being in an adjoining county; and in no other case.(q)

3. Though a witness attend and be sworn, without a subpoena, he is entitled to his fees,(r) and may accordingly bring his action for them, and maintain it by giving parol evidence of being sworn on the call of the party, without producing the record or minutes of the court to prove

(1) 13 Wen. 49.

(j) Cro. Eliz. 122. 1 Jon. 430, S. P.

(k) 7 Dowl. & Ryl. 233.

(l) *Vid. ante*, 502.

(m) *Vid.* 2 R. S. 171, § 82. 2 Str. 1150. 13 East, 16, n. a. S. C. 1 Bl. R. 36. 1 H. Bl. R. 49. 13 East, 15. 1

Mer. 131.

(n) 2 R. S. 192.

(o) 1 B. Moore's R. 76.

(p) 1 Bl. R. 36, 7. *Vid.* 13 East, 15 to 17. Cowp. 845, 6.

(q) 2 R. S. 171, § 80.

(r) 1 Binn. 46.

this fact.(s) Within the same principle, it would doubtless be unnecessary to prove the existence or service of a *subpœna*, though this was done in the last cited case. In this action for witness' fees, however, no other or greater fees than are allowed by the statute, can be recovered, even though the witness be a foreign one.(t)

4. Of the witness' privilege from arrest while attending, &c. vid. ante, 511. He cannot claim this privilege unless he has been duly and in good faith *subpœnaed*. Simple attendance, although in good faith and at the request of the party, is not enough.(u) This was otherwise before the revised statutes.(v) The courts allow a liberal time for the witness to return, before he is liable to arrest.(w) He is protected at his lodgings.(x) But his character of witness will not exempt him from the service of a summons, unless in presence of the court.(y) Nor will the witness be protected while about his ordinary private business, after he is discharged from the obligation of his *subpœna*.(z) This privilege extends only to an exemption from *arrest* in a *civil* suit. It is personal; and if the witness waive it and willingly submit to custody, he cannot afterwards object to the imprisonment as unlawful.(a) A citizen from another state is entitled to the same privilege, in this respect, as a citizen of the state where the court sits.(b)

SECTION II.

OF COMPELLING THE ATTENDANCE OF WITNESSES BY ATTACHMENT.

It is provided by statute, that whenever it shall appear to the satisfaction of the justice, by proof made before him, (which proof may be by the affidavit of the party to the suit, who makes the application, or by other competent testimony,) that any person duly *subpœnaed* to appear before him in any cause, shall have refused or neglected, without just cause, to attend as a witness, in conformity to the *subpœna*; and the party in whose behalf such witness shall have been *subpœnaed*, shall make oath that the

(s) 15 John. 260.	Dall. 487. Id. 329. 7 John. 538. 3 Mass.
(t) 14 John. 257.	R. 288. 3 Cowen, 381.
(u) 2 R. S. 323, § 63. Vid. 6 Mass.	(x) 4 Dall. 387. Vid. 8 Bing. 166.
R. 264.	(y) 1 P. t. C. C. R. 41. 1 Wen. 292.
(v) 8 T. R. 536. 2 John. 294.	But vid. 1 Southard's R. 366.
(w) 2 Bl. R. 1113. 2 Str. 936. 13	(z) 4 Dall. 329.
East, 16, n. a. Vid. 1 Tyl. R. 274. 4	(a) 11 Mass. R. 11.
Har. & McHen. 295. 2 John. 294. 4	(b) 2 John. 294. Vid. 4 Dall. 387.

- testimony of such witness is material, the justice shall have power to issue an attachment to compel the attendance of such witness.(c) The necessary proof of service and refusal or neglect to appear must be by the *affidavit* of the party applying or by other competent testimony. An *affidavit* is a *written* declaration upon oath, and therefore, where the witness has been subpœnaed by the party and he seeks, by his own oath, to lay the foundation of a case for the issuing of an attachment, he must do so in the form of an affidavit. If the service is made by a constable, his return is evidence of that fact—if made by a third person, neither constable nor party, the justice may satisfy himself of the fact of service having been made, by administering an oath and receiving the proof by parol.
- But in either of these cases, it seems to me, from the language of the statute, that proof of non-attendance and materiality must be by *affidavit*. At all events, such is the safer course and should always be adopted, to avoid any controversy in regard to the validity of the attachment.

FORM OF AFFIDAVIT OF THE SERVICE OF A SUBPœNA, &c.

Made by a party on applying for an attachment—to be annexed to the subpœna.

SARATOGA COUNTY, ss.—*James Jackson*, the plaintiff named in the annexed subpœna, being duly sworn says, that he did on the 5th day of November inst., at the town of Malta, in the said county, serve the annexed subpœna on *John Doe*, a witness therein named, by reading the same (or stating the contents thereof,) to him, at the same time paying (or tendering) to him the sum of twelve and a half cents. And this deponent further says, that the testimony of the said *John Doe* is material to this deponent upon the trial of the cause mentioned in the said subpœna; and further, that the said *John Doe* refuses (or has neglected) to attend the trial of the said cause as he was commanded to do in and by the said subpœna.

JAMES JACKSON.

*Sworn before me, this 12th }
day of November, 1840, }*

JOHN B. GILBERT, *Justice of the Peace.*

FORM OF THE OATH,

By a third person, to prove the service of a subpœna.

You swear that you will true answers make to such questions as shall be put to you touching the service of the subpœna, in a cause now pend-

ing before me, between *James Jackson*, plaintiff, and *Richard Roe*, defendant.

FORM OF THE CONSTABLE'S RETURN

Of service of a subpoena—to be endorsed on the subpoena.

The within subpoena personally served on *John Doe*, a witness therein named, on the 5th day of November, 1840: his fees paid. Const. fees, 12½ cts.
George C. Loomis, Const.(d)

The above forms are all that can be required in the proceeding for an attachment. In case the service is proved, other than by the affidavit of the party, that part of the above form of affidavit which relates to the service of the subpoena should be stricken out, thus confining the party to an affidavit of materiality and non-attendance merely. The foregoing form of affidavit, with a little variation, will serve on a defendant's application for an attachment. The strict letter of the statute requires that the affidavit of materiality should be made by the party. This is not perhaps absolutely necessary, but may, under certain circumstances, be made by his agent or attorney.(e)

The attachment is to be issued for the purpose of compelling the attendance of the witness, that he may be sworn on the trial of the cause, and not for the purpose of punishing him, as for a contempt. If, therefore, the witness be near the place of trial, so that the attachment may be served and returned in a short time, it may be made returnable forthwith, and the justice may continue the cause open until the attachment is served and returned; but if the witness be at such a distance from the place of trial, that the attachment cannot be served and returned in a reasonable time for continuing the cause open, the proper course would be to adjourn the trial to such time as would be sufficient for the service and return of the attachment, and to make the attachment returnable at that time.(f)

FORM OF ATTACHMENT,

To compel the attendance of a witness.

SARATOGA COUNTY, ss. The People of the State of New-York: To any constable of said county, GREETING:

We command you to attach *John Doe*, and bring him before the undersigned, a justice of the peace in and for said county, at his dwelling house, in the town of Saratoga Springs, forthwith, (or on the 19th day of

(d) Vid. ante, 502, 3.
 (e) Vid. ante, 841.

(f) Vid. Edw. Treat. 2d ed. 79.

November inst., at one o'clock in the afternoon,) to testify those things which he knows, in an action now depending before the said justice, between *James Jackson*, plaintiff, and *Richard Roe*, defendant, on the part of the plaintiff, (*or defendant*;) and also to answer all such matters as shall be objected against him, for that the said *John Doe* having been duly subpœnaed to attend at the trial of the said action, has refused (*or neglected*) to attend in conformity to such subpœna; and have you then and there this precept. Given under the hand of the said justice, this 12th day of November, 1840.

JOHN B. GILBERT, *Justice.*

The attachment is to be executed in the same manner as a warrant, and the fees of the officers for issuing and serving, must be paid by the defaulting witness, unless he shows reasonable cause, to the satisfaction of the justice, for his omission to attend; in which case, the party requiring the attachment is to pay all the costs of issuing and service. (*g*)

The statute contains no provision directing the manner in which the payment of the costs of issuing and serving the attachment shall be enforced; but on the return of the attachment, the justice should determine whether the witness, or the party, should pay the costs. In case he determines that the witness shall pay them, they may be collected of him by a suit in the name of the party requiring the attachment, and he would be accountable to the justice and constable respectively for their fees, in the same manner as for other services rendered for him; and the party would be accountable, in like manner, to the justice and constable, if the justice should determine that he should pay the costs. (*h*)

SECTION III.

OF IMPOSING A FINE UPON THE WITNESS FOR NON-ATTENDANCE, OR REFUSING TO TESTIFY.

In addition to the power of compelling the attendance of witnesses by process of attachment, it is provided by statute, that every person duly subpœnaed as a witness, who shall not appear, or appearing shall refuse to testify, shall forfeit, for the use of the poor of the town, for every such

(*g*) 2 R. S. 171, § 84.

(*h*) Vid. Edw. Treat. 3d ed. 79, 80.

non-appearance or refusal, (unless some reasonable cause or excuse shall be shown on his oath, or the oath of some other person,) such fine, not less than sixty-two cents, nor more than ten dollars, as the justice before whom prosecution therefor shall be had, shall think reasonable to impose.(i) The witness is not only liable to a fine for his non-attendance or refusal to testify, but he is also liable to the party in whose behalf he was subpoenaed, for all damages which such party may sustain, by reason of such non-appearance or refusal.(j) If the witness be present and have an opportunity of being heard before the justice, the fine may be imposed without the issuing of process.(k) The justice should, in such a case, call upon the witness to show cause why a fine should not be imposed; and if no sufficient cause be shown, impose a fine forthwith, on proof that the subpoena has been served. But if the witness be absent, or if the proceeding be instituted before a justice other than the one before whom the suit in which the penalty was incurred was depending, a summons must be issued against the defaulting witness, which may be in the following form:

FORM OF SUMMONS AGAINST A DEFAULTING WITNESS, TO SHOW CAUSE, &c.

SARATOGA COUNTY, ss. The People of the State of New-York: To any constable of said county, **GREETING:**

We command you to summon *John Doe*, to appear before the undersigned, a justice of the peace, in and for said county, at his dwelling house, in the town of Saratoga Springs, in said county, on the 19th day of November inst., at one o'clock in the afternoon, to show cause why he should not be fined, according to law, for his non-attendance as a witness before the said justice, (*or before Ransom Cook, Esq. a justice of the peace in and for the said county,*) at his dwelling house in the said town, on the 12th day of November inst., to give evidence in a certain cause then depending before the said justice, (*or before the said Ransom Cook, Esq. such justice as aforesaid,*) in which *James Jackson* was plaintiff and *Richard Roe* defendant, on the part of the plaintiff, (*or defendant,*) and have you then there this precept. Given under the hand of the said justice this 16th day of November, 1840.

JOHN B. GILBERT, Justice.

No form for the foregoing summons is prescribed by the statute, nor does the statute contain any provisions regulating the time within which it should be made returnable or served. In the absence of any such provision,

(i) 2 R. S. 171, 2, § 85.

(j) Id. 172, § 90. Vid. 10 John. 248.

(k) 2 R. S. 172, § 86.

as it may be considered in the nature of a notice to show cause, rather than a process in a suit, a reasonable time should intervene between the date and return, and it should be served a sufficient time, before the day of appearance, for the witness to attend. The service should be personal, by reading or stating the contents of the summons, and the constable's return of service would be sufficient to authorize the justice to proceed. Unless the witness appear at the time and place at which the summons is made returnable, and admit due service of the subpœna, the justice should require proof of the service and of the non-attendance of the witness, which proof may be made by oral testimony.

After imposing the fine, the justice is to make up and enter in his docket, a minute of the conviction, and of the cause thereof, which shall be deemed a judgment, in all respects, at the suit of the overseers of the poor of the town.(l) This minute of conviction may be in the following form :

MINUTE OF CONVICTION OF DEFAULTING WITNESS.

SARATOGA COUNTY, ss. Be it remembered, that on the 19th day of November, 1840, *John Doe* is convicted before me, and fined the sum of *ten dollars*, besides *two dollars* costs, for non-attendance as a witness to give evidence before me, (*or before Ranson Cook, Esq. one of the justices of the peace of said county,*) before me, (*or before the said justice,*) at my (*or his*) dwelling house, in the town of Saratoga Springs, on the 12th day of November inst., in a certain cause then and there depending before me, (*or before the said justice,*) in which *James Jackson* was plaintiff, and *Richard Roe* defendant.

JOHN B. GILBERT, *Justice.*

Upon the imposition of the fine, and in default of payment, the justice is forthwith to issue an execution, the form of which is prescribed by the statute.(m)

FORM OF EXECUTION FOR FINE AND COSTS,

Against a defaulting witness.

SARATOGA COUNTY, ss. The People of the State of New-York : To any constable of said county, GREETING :

Whereas *John Doe* was, on the 19th day of November, 1840, convicted and fined by the undersigned, a justice of the peace in and for the said

(l) 2 R. S. 172, § 87.

(m) 2 R. S. 172, § 88.

county, the sum of *ten dollars*, besides *two dollars* costs, for non-attendance as a witness to give evidence before the said justice, (*or before Ransom Cook, Esq. one of the justices of the peace of the said county,*) at his dwelling house, in the town of Saratoga Springs, in said county, on the 12th day of November inst., in a certain cause then and there depending, before the said justice, (*or before the said Ransom Cook, Esq. such justice as aforesaid,*) in which *James Jackson* was plaintiff, and *Richard Roe* defendant ; a record of which conviction, and of the cause thereof, has been duly made up and entered in the docket of the undersigned. And whereas the said *John Doe* has neglected to pay the said fine and costs :

You are hereby commanded to levy the said fine and costs of the goods and chattels of the said *John Doe* ; and for want thereof, to take and convey the said *John Doe* to the jail of the said county, there to remain until he shall pay such fine and costs. And the keeper thereof is required to keep the said *John Doe* in close custody in said jail, until the fine and costs aforesaid be paid, or until thirty days after the commencement of his imprisonment. Given under the hand of our said justice, at the town of Saratoga Springs, on the 19th day of November, 1840.

JOHN B. GILBERT, *Justice.*

Although no mode of selling the property levied on, be pointed out by the statute, yet the officer doubtless may, instead of resorting to a private sale, advertise and sell in the manner we shall hereafter notice, in case of a levy upon execution, and such seems to be a safe and fair mode of doing the business.

In levying or serving this warrant, either upon the property or body of the offender, (and so of all warrants from a justice for levying a forfeiture in execution of a conviction,) the officer may justify breaking open the outer door of a dwelling house to effect this purpose, if he be refused admittance on demand made. *(n)*

When the money is collected upon this execution, the constable must return it to the justice, and the justice must pay over the amount of the fine imposed, to the overseers of the poor of the town, for the use of the poor. *(o)*

A suit will not lie against a justice to recover back the amount of a fine imposed upon and collected of a witness for refusing to be sworn, or for any other contempt. A justice is not liable to a suit for a judicial act ; and the merits of the imposition of a fine, (the justice having jurisdiction of the matter,) cannot be overhauled before another justice. *(p)*

(n) Vid. Hawk. P. C. 8th Lond. ed. 186.

(o) 2 R. S. 172, § 89.
(p) 3 Caines, 170.

SECTION IV.

OF THE COMMISSION TO EXAMINE FOREIGN WITNESSES.

It is provided by statute, that whenever an issue of fact shall have been joined in any action or suit before a justice of the peace, and it shall appear on the application of either party, that any witness not residing within the county where said suit is pending or the county adjoining, is material in the prosecution or defence of such action or suit, the said justice may award a commission to one or more competent persons, authorizing them or any one of them to examine such witness on oath, upon the interrogatories settled by the said justice, and certified by his approbation, entered or endorsed thereon, or by the written agreement or assent of the parties, annexed to such commission; to take and certify the deposition of such witness, and to return the same, according to the directions given with such commission, in which commission both parties may unite. (q)

It will be seen, from the language of the above section, that a commission can only be awarded upon an issue of fact. As to what is an *issue of fact*, as contradistinguished from an *issue of law*, vid. ante, 833, 4. The commission may be issued as well on the application of the plaintiff as of the defendant; but is proper in no case except it is made to appear by the oath of the party or other competent testimony, that the witness, whose testimony is sought to be obtained, resides in some place other than in the county where the suit is pending or the adjoining county, and that his testimony is material to the prosecution or defence of the action.

It is further provided by statute, that the commission may be granted at the instance of either party, at any time, upon proof that due notice of the application therefor has been served on the adverse party at least six days before the time of making such application; but the issuing of the commission shall not postpone the trial beyond the time authorized by law, (ninety days.) (r)

The commission may be granted *at any time*. It cannot, except by consent, be issued at the time of joining issue, or at any other time, unless six days notice of the application has been given. The proper course to be pursued, where either party contemplates applying for a commission, is to state that fact to the justice at the joining of issue, who may then adjourn the

(q) Laws of 1838, p. 232, § 2.

(r) Id. § 3.

cause for a week or eight days, if the application be on the part of the plaintiff; or for ninety days or such shorter period as he may think proper and reasonable, if the application be made by the defendant. In either of these cases, however, the justice would not be authorized to adjourn on the mere statement of either party that he intends to apply for a commission. He should in the first place make out a proper case for an adjournment, and comply with all the conditions imposed by the statute, if required.(s) But this commission may be granted at any stage in the suit, and neither party is bound to give notice of his intention to apply at the time of joining issue. If after issue joined and one or more adjournments granted, a material witness should absent himself, either party might then, upon due notice, apply for a commission to take his testimony. The statute does not make it imperative upon either party to take the testimony of his witness upon commission. If he can procure his personal attendance within the time that an adjournment may be granted, he may, at his option, dispense with the necessity of a commission. This may frequently be done, where the witness is desired by the defendant, for he may obtain an adjournment of ninety days, if required by the exigencies of the case. Not so, however, with the plaintiff. He is not, except by the consent of the defendant, entitled to an adjournment exceeding eight days. If therefore, in addition to the proof of absence and materiality, the defendant swears that he expects to be able to procure the personal attendance of his witness within the ninety days, he is entitled to an adjournment, and is not bound to sue out a commission to take his testimony. The commission is to be granted upon proof that due notice of the application therefor has been served on the adverse party at least six days before the time of making such application. This notice may be in the following form :

FORM OF NOTICE OF APPLICATION FOR A COMMISSION.

James Jackson }
 v. } Before JOHN B. GILBERT, Esq. one of the justices of
 Richard Roe. } the peace in and for the county of Saratoga.

Sir: Take notice that an application for a commission to be directed to *Thomas Noakes*, of the city of New-York, to examine *John Smith* of the same place, a witness in the above entitled cause, upon interrogatories to be annexed to such commission, will be made to *John B. Gilbert, Esq.* at his dwelling-house in the town of Saratoga Springs, on the 12th day of November inst. at one o'clock in the afternoon. Saratoga Springs, November 5, 1840.

JAMES JACKSON, *Plff.*

To *Richard Roe, Def't.*

(s) Vid. ante, 837 to 857.

This notice may be given intermediate the date of the process and the time of its return, so that the application can be made at the joining of issue, if this course is thought advisable in order to expedite the trial of the cause. The notice must be served at least six days before the application is made. The mode of computing the time is, within the rule given ante, 262, 3, by *excluding* the day of service and *including* the day on which the application is to be made ; so that a notice served on *Thursday* is good for the next *Wednesday*. This notice must be served upon the opposite *party*, and should be a *personal* service. It is hardly to be supposed that the legislature intended to require a service upon the party *in person*. In case of his absence, it would, undoubtedly, be sufficient to serve the notice upon his agent or attorney duly authorized to conduct the suit in his behalf. In either case, however, the service should be *personal*. Proof that this notice has been served should be made to the justice, unless this is waived by the appearance of the opposite party *in person* or by attorney. This proof may be by affidavit or by parol. If by affidavit, it may be in the following form :

FORM OF AFFIDAVIT OF SERVICE OF NOTICE :

To be annexed to a copy of the notice.

IN JUSTICE'S COURT.

James Jackson }
v.
Richard Roe. }

SARATOGA COUNTY, ss. *John Doe*, being duly sworn says, that on the 5th day of November inst. he served a notice of which the annexed is a copy, upon *Richard Roe*, the defendant therein named, by delivering the same to him, (or to *F. Hoag*, his attorney) personally.

JOHN DOE.

Sworn before me this 12th }
day of November, 1840. }

JOHN B. GILBERT, Justice.

If proof of service is made by parol, it may be on an oath to be administered by the justice, in the following form :

FORM OF OATH.

You do swear that you will true answers make to such questions as shall be put to you touching the service of notice of an application for a commission in this cause.

If the application is made by the defendant, the title of the cause in the notice and affidavit is to be varied, as directed ante, 467, note (1.)

On appearing before the justice at the time mentioned in the notice

the party applying should make oath that the absent witness whose testimony is desired does not reside in the county where the suit is pending or the county adjoining, and that his testimony is material to the prosecution or defence of the action, as the case may be. In case the party asking for the commission should state what facts he expects to prove by the absent witness, which facts are admitted by the opposite party, the justice should refuse the commission ;(†) and so if it should appear on the cross-examination of the party applying, or otherwise, that there are no sufficient grounds for issuing the commission, as that it is intended merely for delay, &c., it should not be granted. The oath to be administered to the party, may be in the following form :

FORM OF THE OATH TO OBTAIN A COMMISSION.

You do swear that you will true answers make to such questions as shall be put to you touching the necessity of issuing a commission in this cause.

If the party applying makes out a proper case for a commission, it should be immediately granted by the justice, directed to the individual named in the notice, unless good cause is shown against him. If it appear to the justice that the person named is, for any reason, incompetent or unfit to execute the commission, he should name some other individual who is entirely free from all objection and direct the commission to him. The commission may be in the following form :

FORM OF COMMISSION TO EXAMINE WITNESSES.

SARATOGA COUNTY, SS. To *Thomas Noakes*, of the city of New-York : Whereas, it appears to me, the undersigned, a justice of the peace of the town of Saratoga Springs, in the said county of Saratoga, that *John Smith*, of the said city, is a material witness in a certain cause now pending before me, at the said town of Saratoga Springs, in the county aforesaid, between *James Jackson*, plaintiff, and *Richard Roe*, defendant ; now therefore, in confidence of your prudence and fidelity, and in pursuance of the statute in such case made and provided, I have appointed you, and by these presents do appoint you commissioner to examine the said witness ; and do, therefore, authorize you at certain days and places, to be by you for that purpose appointed, diligently to examine the said witness, on the interrogatories hereto annexed, on oath, to be taken before you, and to cause such examination to be reduced to writing, and signed by such

(†) Vid. ante, §46, 7.

witness and yourself, and then return the same annexed hereto, to me, enclosed under your seal. Given under my hand, at the town aforesaid, the 12th day of November, 1840.

JOHN B. GILBERT, *Justice*.

The interrogatories, if not agreed to by the parties, should be settled by the justice. This should, perhaps, be done at the time the commission is applied for; though there can be no doubt, from the necessity of the case, that the justice may give the parties a reasonable time, to be specified by him, to prepare and submit to him, for settlement, the interrogatories and cross-interrogatories to be annexed to the commission. The interrogatories must embrace the subject of inquiry, and, in doing so, must be governed by the rules applicable to oral examinations. The parties are, however, authorized to insert a general interrogatory, whether the witness knows of any other matter or thing, material to the party, beside what he has been particularly interrogated unto; under which the witness may state facts not previously called for under the particular interrogatories. And if this interrogatory be not answered, the deposition cannot be read; it being an undoubted principle, that the witness must answer, substantially, all the interrogatories, as it is otherwise impossible to say that he has told the whole truth. Nor is it an objection to a deposition, that a material part of the evidence comes out under the general interrogatory.(u)

FORM OF INTERROGATORIES, AND CROSS-INTERROGATORIES;

To be annexed to the commission.

Interrogatories to be administered to *John Smith*, a witness to be produced, sworn and examined on the part and behalf of *James Jackson*, plaintiff, in a certain cause now depending before *John B. Gilbert, Esq.* a justice of the peace of the county of *Saratoga*, against *Richard Roe*, defendant, at the suit of the said *James Jackson*, before *Thomas Noakes*, under and by virtue of a commission hereto annexed.

First. Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either, and which of them, and how long have you known them, or either, and which of them?

Second. Are you acquainted with the hand-writing of the said *Richard Roe*?

Third. Look upon the paper writing now produced and shown to you, at this, the time of your examination, marked "A," and purporting to be

(u) Vid. *Grah. Prac.* 2d ed. 596, and the cases there cited.

a promissory note, made by the said *Richard Roe* to the said *James Jackson*, or bearer, for *fifty* dollars, and bearing date the *first* day of *January*, 1840. Do you know the signature of *Richard Roe* to the said promissory note, and whose hand-writing is the same?

Lastly. Do you know any other matter or thing touching the matters in question, that may tend to the benefit or advantage of the plaintiff? If yea, declare fully and at large, as if you had been particularly interrogated thereto.

Cross-Interrogatories.

Interrogatories to be administered to the said *John Smith*, by way of cross-examination. (*State interrogatories as the circumstances of the case require.*)

The interrogatories are, of course, to be varied to suit each particular case.

If the interrogatories are agreed to by the parties, they may, without having them settled by the justice, signify this fact by a written agreement or assent to be annexed to the commission. This agreement may be in the following form:

FORM OF ASSENT TO BE ANNEXED TO THE COMMISSION, *Where the parties agree to the interrogatories.*

The undersigned, the parties to the suit named in the annexed commission and interrogatories, hereby agree that the interrogatories hereto annexed, may be propounded to the witness therein named by the commissioner, to whom the annexed commission is directed.

JAMES JACKSON,
RICHARD ROE.

If the parties cannot agree to the interrogatories, they are to go before the justice, and have them settled by him. This being done, the justice enters or endorses thereon his approval, in the following form:

FORM OF APPROVAL OF INTERROGATORIES BY THE JUSTICE.

The foregoing, (*or within*) interrogatories on the part of the plaintiff, (*and cross-interrogatories on the part of the defendant,*) are hereby approved. Saratoga Springs, Nov. 12, 1840.

JOHN B. GILBERT, *Justice of the Peace.*

The commission having been made out and signed by the justice, he should annex to it the interrogatories with his approval endorsed, or with

the agreement of the parties. He should then enclose the whole in letter form, directed to the commissioner, at his place of residence, and, unless otherwise agreed by the parties, deposit this letter in the post office, first exacting from the party, upon whose application the commission issues, a sufficient sum to pay the postage to and from the commissioner. However, all this formality may be waived by consent of parties, and the commission, &c. delivered directly to the party applying, who may take such means as he may deem advisable for forwarding it to the commissioner.

The statute provides that the commission shall be executed and returned, as is prescribed by statute, when a commission issues out of a court of record.^(v) The provisions of the statute, directing the manner of executing and returning a commission issuing from a court of record, are contained in 2 R. S. 315, § 24, and are as follows: "The persons to whom such commission shall be directed, or any one of them, unless otherwise expressly directed therein, shall execute the same as follows: 1. They, or any one of them, shall publicly administer an oath to the witnesses named in the commission, that the answers given by such witnesses to the interrogatories proposed to them, shall be the truth, the whole truth, and nothing but the truth: 2. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him and certified by such of the commissioners as are present at the taking of the same: 3. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall in like manner be subscribed by the witness proving the same, and shall be certified by the commissioners: 4. The commissioners shall subscribe their names to each sheet of the depositions taken by them; they shall annex all the depositions and exhibits to the commission, upon which their return shall be endorsed; and they shall close them up under their seals, and shall address the same, when so closed, to the clerk of the court from which the commission issued, or to the clerk of the county in which the venue shall be laid, as shall have been directed on the commission, at his place of residence: 5. If there is a direction on the commission to return the same by mail, they shall immediately deposit the packet so directed, in the nearest post office: 6. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet so directed shall be delivered to such agent. A copy of this section shall be annexed to every commission authorized by this article."

^(v) Laws of 1838, p. 232, § 4.

It will be seen that the fourth subdivision of the foregoing section of the statute, directs the commission, &c. to be returned to the clerk of the court or of the county. This provision is inapplicable to a justice's court, and the commission should therefore, together with the depositions and exhibits, be sent by the commissioner directly to the justice. It is perhaps unnecessary, in justices' courts, except for the instruction of the commissioner, that a copy of the above section should be annexed to the commission, as therein directed. The act of 1838, under which this proceeding is allowed, only refers to the foregoing section for directions as to the manner of *executing* and *returning* the commission, and contains in itself all the necessary provisions in regard to the mode of *issuing* the commission. It is advisable, however, where the commission is to be executed out of the state, that a copy of the foregoing section should be annexed, in order that the commissioner may be informed of the particular requisites of our statute, which must be complied with to render the deposition valid as testimony in the cause.

FORM OF COMMISSIONER'S SUMMONS TO A WITNESS.

CITY AND COUNTY OF NEW-YORK, ss. Whereas the undersigned has received a commission, issued by *John B. Gilbert*, Esq. a justice of the peace of the county of Saratoga, directed for the examination of *John Smith*, a witness in a cause depending before the said justice, between *James Jackson*, plaintiff, and *Richard Roe*, defendant: You, the said *John Smith*, are therefore required to be and appear before me, the said commissioner, at, &c. on, &c. then and there to be examined, and to testify the truth according to the best of your knowledge, for and on behalf of the said plaintiff, (or defendant,) and herein you are not to fail. Dated this — day of —, 1840.

THOMAS NOAKES.

FORM OF OATH TO BE ADMINISTERED TO WITNESS BY COMMISSIONER.

You do swear, that the answers to be given by you to the interrogatories to be proposed to you, by the commissioner here present, to execute a commission directed to him, issued by *John B. Gilbert*, Esq. a justice of the peace of the county of Saratoga, in a cause there depending before him, between *James Jackson*, plaintiff, and *Richard Roe*, defendant, shall be the truth, the whole truth, and nothing but the truth.

FORM OF CAPTION OF DEPOSITION.

Deposition of *John Smith*, a witness produced, sworn and examined on oath, on the — day of —, 1840, at, &c. by virtue of a commission

issued by *John B. Gilbert*, Esq. a justice of the peace of the county of Saratoga, to me, *Thomas Noakes*, directed, for the examination of the said *John Smith*, a witness in a cause depending before the said justice, between *James Jackson*, plaintiff, and *Richard Roe*, defendant.

The said *John Smith* deposes as follows: To the first interrogatory this deponent says, &c.

To the second interrogatory this deponent says, &c.

JOHN SMITH.

*Subscribed and sworn before me, }
this — day of —, 1840. }*

THOMAS NOAKES, *Commissioner*.

FORM OF ENDORSEMENTS OF AN EXHIBIT.

On the — day of —, 1840, at the execution of a commission issued by *John B. Gilbert*, Esq. a justice of the peace of the county of Saratoga, for the examination of *John Smith*, a witness in a cause depending before the said justice, between *James Jackson*, plaintiff, and *Richard Roe*, defendant, the within paper writing marked "A," was produced and shown to the said *John Smith*, a witness sworn and examined, and by him deposed unto at the time of his examination as a witness, under such commission.

THOMAS NOAKES, *Commissioner*.

The deposition and testimony taken in pursuance of the commission is to be received on the trial as testimony in the cause, with the like effect as if the witness were personally examined at the trial.(w)

SECTION V.

OF TRIAL BEFORE THE JUSTICE WITHOUT A JURY.

AFTER an issue of fact joined, and before the justice proceeds to inquire into the merits of the cause, that is, before the commencement of the examination of witnesses, or the receiving of other evidence to the point in issue, if neither party calls a jury, the justice must then try the cause himself alone; he must hear the proofs and allegations of

the parties, and determine the same according to law and equity, as the very right of the case may appear.(x)

In doing this, the justice ought ever to keep in mind, that he is acting in a two fold capacity—as a judge directing and controlling the proceedings, according to the established rules of law; and as a juror trying the facts. The first thing which it is the duty of the justice to turn his mind to, and in doing which he will find advantage, is the issue between the litigant parties, that is, what they have affirmed on one side, and denied on the other, which we remember is the definition of an issue.(y) Persons unaccustomed to legal investigation, are very apt to drag into their altercations, on trial, abundance of extraneous irrelevant matter. To keep them to the true points, requires an attentive distinguishing mind; great convenience will result from observing rules and pursuing a correct system.(z) This cannot be attained without very considerable attention to the doctrine of pleadings and evidence, both of which heads will be found spoken to at large in the course of this work.

A justice is not, like a juror, liable to be challenged for favor, partiality, or even corruption; though he would be subject to indictment for the latter.(a) Thus, where the justice was the father-in-law of the plaintiff;(b) or where he was half uncle to the plaintiff's wife;(c) or where he had given an opinion in the cause,(d) this was held to be no cause of challenge. But there is a gross indecency in one's trying a cause, as justice, for a near relation, which should induce the supreme court, on certiorari, to scrutinize his proceedings with a jealous eye.(e) And if the fact of relationship appear from the return, the judgment would be reversed.(f) And it is the duty of a justice, where he has inadvertently issued process, or proceeded in the prosecution of a suit in which he is related to one of the parties by consanguinity or affinity, on his attention being called to the fact, to suspend all further proceedings and render no judgment whatever in the cause; he cannot, on that ground, render judgment of nonsuit, if the plaintiff be his relative; and if he does render such judgment, it will be reversed.(g) The statute declares,(h) that no judge of any court *can sit*, as such, in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to

(x) Vid. 2 R. S. 172, § 91.

(y) Ante, 833, 4.

(z) Vid. Penning. on Small Causes, 146, 7.

(a) 12 John. 356.

(b) 13 id. 191.

(c) 17 id. 133.

(d) 12 id. 356.

(e) 13 id. 191.

(f) 21 Wen. 63.

(g) Id.

(h) 2 R. S. 204, § 2.

either of the parties. It is not denied, that this applies to a justice.⁽ⁱ⁾ And therefore, although a justice who is related to one of the parties in a suit before him, cannot be prevented from proceeding with the cause by a *challenge* or *otherwise*, yet his judgment in the cause, if he render one, will be reversed for this cause alone. And a justice ought never to grant process for the trial of a cause, either where he is the near relative of the party by blood or marriage, or where his opinion has been sought and obtained in relation to the matter in controversy ; nor even where the party has made a statement of facts, and taken from the justice any direction whatever concerning them, though it be merely as to a course of proceeding to obtain redress.

In this trial before a justice alone, if the party mean to submit to a nonsuit, he must do so before the cause is finally submitted for advisement, or the judgment will be a bar to a new action ;^(j) and this, although the justice call his judgment a judgment of nonsuit, and enter it accordingly.^(k)

There is no such thing as a judgment by default in a justices's court, and it is therefore provided by statute, that whenever a defendant who has been personally served with a summons, or who shall have procured an adjournment without having joined issue, shall neglect to appear and join issue, the justice shall proceed to hear the proofs and allegations of the plaintiff, and determine the same in the same manner as though an issue were joined.^(l) That is, the defendant's omission to appear and plead, is not considered as an admission of the plaintiff's demand, but he must establish it by testimony, in the same manner as though an issue had been joined.^(m) And so, though the defendant appear and refuse to plead ; for such refusal would not amount to an admission of the plaintiff's demand.

(i) 21 Wen. 64.
(j) 11 John. 457. Ante, 726.
(k) 10 Wen. 519.

(l) 2 R. S. 173, § 92.
(m) 10 John. 106.

SECTION VI.

OF CERTAIN PARTICULARS, APPLICABLE TO A TRIAL BEFORE A JUSTICE OR JURY.

A CAUSE cannot, without consent of parties, be tried at a place different from the one appointed by the justice, for the trial thereof; and where the trial was at a place different from the one mentioned in the summons, the judgment was reversed.(n) And the justice should be careful not to mislead the party, as to any fact material to influence his conduct in preparing for trial; for where a justice stated to the defendant that the cause was discontinued, and yet proceeded to trial and gave judgment, it was reversed for that reason.(o)

The justice may, where the exigency of the case requires it, continue his court open from one day to another; as where there is a delay in summoning a jury.(p) And he may even hold his court open a reasonable time, to enable a party to procure a material witness—two hours was held not unreasonable in one case;(q) but twenty hours was holden an abuse of discretion, where the witness was twelve miles distant.(r)

No other than the justice who tries the cause, has power to swear the witnesses,(s) and if the presiding justice be himself sworn as a witness, by another justice, who attends for the purpose, this is error, and the judgment will be reversed.(t) But this is, provided an objection be made thereto; for if the justice be sworn in this form,(u) or even give his evidence to the jury, without oath at all,(v) and the party makes no objection, his consent will be presumed, which will take away the error.

A *demurrer* to evidence, is inapplicable to a justice's court.(w)

If the plaintiff be satisfied, that his proof is insufficient to sustain his action, he may, as we have just noticed, at any time before the cause is submitted to the justice for advisement, if he sets alone, elect to withdraw, and submit to a nonsuit.(x) And if the trial be by jury, he may do this, when they return to deliver their verdict, before the same is pro-

(n) 12 John. 417.

(o) 12 John. 378.

(p) 2 Caines, 134. Id. 137, per Kent,
C. J.

(q) Ante, 847.

(r) 13 John. 469. Ante, 847.

(s) 1 John. 520.

(t) Id.

(u) 8 John. 478.

(v) 7 id. 198. 12 id. 296.

(w) 3 Caines, 140.

(x) Ante, 878. Vid. also 2 R. S. 176,
§ 119.

nounced by the foreman.(y) And if on such return he does not appear, on being called, the verdict cannot be received, but the justice should give a judgment of nonsuit against him.(z) In like manner, if, in the opinion of the justice, the testimony offered does not support the action, he may, after the plaintiff has closed his evidence, give judgment of nonsuit against him, without hearing the defendant's proof.(a) But as it requires considerable legal information to exercise this branch of the proceedings correctly, it is certainly most advisable for the justice to nonsuit only in plain cases. For instance, should the plaintiff ground his action on a written instrument, and fail to prove the instrument, or in cases equally plain, the justice should nonsuit the plaintiff, and discharge the jury, (if there be one,) noting the nonsuit in his docket.(b)

SECTION VII.

OF TRIAL BY JURY.

AFTER issue joined, and before the justice shall proceed to an investigation of the merits of the cause, by an examination of a witness, or the hearing of any other testimony, either of the parties, or the attorney of either of them, may demand of the justice, that the cause be tried by a jury.(c) But an issue must first be joined, and it is erroneous to award a venire where the defendant has not pleaded.(d) This issue must be an issue of fact(e)—not a demurrer or issue of law;(f) for this must be decided by the justice only.(g) We have already noticed what will, in general, be deemed an enquiry into the merits of the cause.(h) The mere inspection by the justice, of the note in question in the cause, will not be deemed such an enquiry into its merits as to preclude the demand of a jury.(i) Proceeding to enquire into the merits, means the investigation of the merits by an examination of witnesses or other testimony;(j) and

(y) 5 John. 346.
 (z) Id. 2 R. S. 176, § 119.
 (a) 12 John. 299. 10 Wen. 519. Penning. on Small Causes, 175.
 (b) Penning. on Small Causes, 175.
 (c) 2 R. S. 173, § 93. Vid. ante, 876.
 (d) 3 Caines, 219.

(e) Vid. ante, 833, 4.
 (f) Id.
 (g) 18 John. 140.
 (h) Ante, 876.
 (i) 1 John. 142.
 (j) 1 Cowen, 86. 2 R. S. 173, § 93.

in one case where the justice told the plaintiff to go on to trial, after both parties had avowed themselves ready, and on being asked, the defendant admitted part of the plaintiff's account, and a witness for the plaintiff was partly sworn; it was held too late to call for a *venire*.(k)

Upon the demand of a trial by jury, the justice is to issue a *venire* directed to any constable of the county wherein the cause is to be tried, commanding him to summon twelve good and lawful men, in the town where such justice resides, qualified to serve as jurors, and not exempt from serving on juries in courts of record,(1) who shall be in no wise of kin to the plaintiff or defendant, nor interested in such suit, to appear before such justice, at a time and place to be named therein, to make a jury for the trial of the action between the parties named in such *venire*.(l)

(1) The following are the *qualifications* of jurors. They are to be males, of the age of twenty-one years or upwards, and under sixty years old; possessed of personal property in their own right, to the amount of two hundred and fifty dollars; or having a freehold estate in real property in the county, belonging to them in their own right, or in the right of their wives, to the value of one hundred and fifty dollars; in the possession of their natural faculties, and not infirm or decrepit; free from all legal exceptions, (that is, not being aliens, and not having been convicted of an infamous crime,) of fair character, of approved integrity, of sound judgment, and well informed. 2 R. S. 332, § 13. In addition to the above qualifications, it will be seen by referring to the section of the statute cited in the text, that jurors in justices' courts must be inhabitants of the town in which the justice resides, except in actions between two towns, in which cases, as provided by statute, 2 R. S. 173, § 96, the jury is to be formed of inhabitants of the county at large, without reference to the town of their residence. As to the qualifications of jurors in the counties of Niagara, Erie, Chautauque, Cattaraugus, Allegany, Genesee, Orleans, Monroe, Livingston, Jefferson, Lewis, St. Lawrence, Steuben and Franklin, vid. 2 R. S. 332, § 14.

The following persons are *exempt* from serving on juries. 1. Non-commissioned officers, musicians and privates of any uniformed company or troop, duly equipped and uniformed according to law. (And musicians in every company of infantry, not exceeding five. 1 R. S. 289, § 8, 9.) The evidence of such exemption shall be the certificate of the commanding officer of the company or troop, that the person claiming the same, is a member of such company, and is duly equipped and uniformed, according to law. Such certificate must be dated within three months of the time of presenting the same; and the signature must be verified by oath. 2. Members of any company of firemen, duly organized according to law. 3. Persons in the actual employment of any glass, cotton, linen, woolen or iron manufacturing company, by the year, month or season. 4. Superintendents, engineers and collectors of any canal authorized by the laws of the state, any portion of which shall be actually constructed and navigated. 5. Ministers of the gospel, teachers in any college or academy, and all persons specially exempted by law from serving on juries. 2 R. S. 335, § 33.

In addition to the above exemptions specifically pointed out by statute, it is further provided, that the court to which any person shall be returned as a juror, shall excuse such juror from serving at such court, whenever it shall appear, 1. That he is a practicing physician, and has patients requiring his attention: 2. That he is a surrogate, or justice of the peace, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror: 3. That he is a teacher in any school, actually employed and serving as such: 4. When, for any other reason, the interests of the public, or of the individual juror, will be materially injured by such attendance; or his own health, or that of any member of his family, requires his absence from such court. 2 R. S. 336, § 35.

(k) 1 Cowen, 235.

(l) 2 R. S. 173, § 94.

FORM OF THE VENIRE.

SARATOGA COUNTY, }
 Town of Saratoga Springs, } ss.

The People of the State of New-York: To any constable of the said county, GREETING:

You are hereby commanded to summon *twelve* good and lawful men in the said town, qualified to serve as jurors, and not exempt from serving on juries in courts of record, and who are in no wise of kin to either party, nor interested in the suit hereinafter named, to appear before the undersigned, one of the justices of the peace of the said county, at his dwelling house in the said town, on the *twelfth* day of *November* inst. at one o'clock in the afternoon, to make a jury for the trial of an action of *trespass on the case*, between *James Jackson*, plaintiff, and *Richard Roe*, defendant. And have you then there the names of the jurors and this precept. Dated at the said town of Saratoga Springs, the *fifth* day of *November*, 1840.

JOHN B. GILBERT, Justice.

Preserve the character of the parties in the venire, as ante, 456, 7.

The parties may agree upon any number of jurors, less than six, to try the cause. In such a case, the justice is to direct, in the *venire*, the summoning of double the number of jurors thus agreed upon. (m) The justice is to deliver the *venire*, or cause it to be delivered, to some constable of the county, disinterested between the parties, and against whom no reasonable objection shall have been made by either party. (n) As to what is a reasonable objection, is left, in some measure, to the discretion of the justice. Strictly speaking, he can enquire into the existence of the objections only upon the oath of the party or a third person; though it is the common practice, upon the simple objection of either party to a particular constable, to deliver it to another who is free from all objection. This course is very properly pursued where it will not produce unnecessary delay in the trial of the cause, and where it is evident that the objection is not raised with such a view. It would be a valid objection that the return to the *venire*, if executed by the constable, would be set aside upon a challenge to the array, of which we shall speak at large hereafter. So, if it should be made to appear that there exists a settled hostility between the constable and the party objecting; or that the constable and the adverse party are on terms of peculiar intimacy and friendship, so much so as to lead the justice to suspect his integrity, or that his

(m) 2 R. S. 173, § 95.

(n) Id. § 97.

feelings may be interested in behalf of the party ; or the like, he should deliver the *venire* to another constable against whom no objection is made. If required, the party, or some one in his behalf, should be sworn in regard to the objections made to the constable. The oath may be in the following form :

FORM OF OATH ; *on objection to constable.*

You do swear, that you will true answers make to such questions as shall be put to you, touching the reasons why *George C. Loomis* should not execute the *venire* in this cause.

The constable is to execute the *venire* fairly and impartially, and must not summon any person whom he has reason to believe biassed or prejudiced for or against either of the parties. He is to summon the jurors *personally*, and make a list of the persons summoned ; which list he must certify and annex to the *venire*, and return to the justice. (o) The manner of service may be, (as is the usual practice,) by reading or stating the substance of the *venire* to each person summoned, care being had to state the name of the justice issuing the *venire*, together with the time and place of trial. The jurors should have a reasonable time to attend, after notice, as in the case of witnesses. (p) In this case, the officer's return, with the panel, will be, at least *prima facie*, and perhaps *conclusive* evidence of the *venire* being duly served, on a proceeding against a juror for his non-attendance ; (q) for it is a general rule, that an officer's return, made officially, is *prima facie* evidence, even between third persons. (r)

FORM OF RETURN TO A VENIRE.

I certify, that by virtue of the within precept, I have personally summoned as jurors, the several persons named in the annexed list. Dated the — day of —, 1840.

GEORGE C. LOOMIS, *Constable.*

Where a *venire* has once been issued, the justice cannot try the cause without a jury ; (s) though this would be otherwise where the party objecting had himself suppressed the *venire* ; (t) as if the justice should deliver the *venire* to the party for the purpose of handing to the constable,

(o) 2 R. S. 173, § 98. (r) 11 East, 297.
 (p) Ante, 859, 60. (s) 8 John. 460.
 (q) 2 R. S. 175, § 112. Vid. 14 John. (t) 2 Caines, 134.
 482. 11 East, 297. 4 Burr. 2129.

which he should neglect to do, and the party should not appear at the return of the *venire*, the justice would have a right to consider it as a waiver of the trial by jury; and although he might issue another *venire*, he would not be bound to do so.(u) And so, where the *venire* demanded by the party is not returned, and no further *venire* is demanded by him, but he contents himself with moving for a nonsuit on that ground, which motion the justice overrules, and holds the parties to a trial, this has been held right.(v) And so the party may expressly waive a trial by jury after his *venire* has issued, or his conduct may amount to a waiver thereof, as in the last cited case.(w) And so, where the jury cannot agree on a verdict, and are discharged, the justice may, by consent of parties, render judgment on the evidence already before him.(x)

The party demanding a trial by jury, has undoubtedly a right to waive such trial after a *venire* has been issued; but if the *venire* has been served and returned, the other party would have a right to insist that the cause be tried by the jury thus returned, notwithstanding the party demanding the *venire*, should waive it; or if a jury should not be obtained on that *venire*, he might require that a new *venire* should be issued at his instance.(y)

Before proceeding to draw the jury, in the manner directed hereafter, the justice should call over the constable's list of jurors, entering the names of such as do, and such as do not appear and answer. This being done, the names of such of the persons returned by the constable as appear, are to be respectively written on several and distinct pieces of paper, as nearly of one size as may be; and the constable, in the presence of the justice, is to roll up or fold such pieces of paper, as nearly as may be, in the same manner, and put them together in a box, or some convenient thing.(z) The justice is then to draw out six, (or such number as the parties may have agreed upon,) of such papers, one after another, and if any of the persons whose names shall be so drawn, shall be challenged and set aside, then such further number shall be drawn as will make up the number required, after all legal causes of challenge allowed by the justice. The persons so drawn, appearing, and approved as indifferent, are to compose the jury to try the cause.(a) If a sufficient number of competent jurors are not drawn, the justice may supply the deficiency by awarding a *tales de circumstantibus*, that is, by directing the constable to summon any of the by-standers, or others, who may be

(u) 19 John. 384.

(v) 7 id. 198.

(w) Id. 8 John. 480, per Cur.

(x) 2 R. S. 175, § 111.

(y) Vid. Edw. Treat. 3d ed. 89.

(z) 2 R. S. 173, § 99.

(a) Id. § 100. Vid. 2 John. 396. 10 Co. 108.

competent, and against whom no cause of challenge shall appear, to act as jurors in the cause.(b) The persons thus summoned are called *talesmen*. If the constable do not return the *venire*, or if a full jury be not obtained, in the manner above directed, the justice is to issue a new *venire*,(c) continuing his court open, holding the parties, jurors, &c. present in attendance, until the constable shall summon from the town the number of jurors wanted.(1) This new *venire* is to be in the same form as that given ante, 882, with this difference, that instead of the full number of jurors originally wanted, it commands the constable to summon "*three good and lawful men, &c.*," (or other number wanted,) "*to make so many of a jury, &c.*" The justice may, if necessary, issue this process from time to time, till there be a full jury. On the jurors' appearing upon the new *venire*, they are called and sworn without being ballotted for, though subject to the same challenges as regular jurors.

If no jurors appear, or none are found competent, or if the *venire* is quashed, or not returned, or the array challenged for good cause, &c., a new *venire* must be issued from time to time, until a jury is obtained qualified to try the cause.(d) In such case, the second *venire* will be deemed the process of the party demanding the first, who, consequently, will have no right to object to any error therein.(e) A defendant is not entitled to a *nonsuit*, because the *venire* is not returned at the time appointed for trial; another *venire* may be issued; and if the defendant does not demand it, but goes to trial before the justice, it is a waiver of the trial by jury.(f) The party demanding the jury process cannot object to the form of it.(g) It should preserve the characters of the parties, as mentioned ante, 456, 7; but, in a proceeding against joint debtors, the *venire* need only mention the names of those who are duly and personally served with process, and who appear in court.(h) Every defect in a *venire* is cured, if the party go to trial upon it without objection.(i)

OF CHALLENGES.

Before the jury are sworn, if a party have any objection either of interest, or favor, or for other cause, against the constable summoning them, or any of the jurors, whether originally summoned as such, or called as *talesmen*, he must state his objection to the justice, which is called a challenge. A challenge is of two kinds: 1. To the array, 2. To the polls.

(b) 2 R. S. 174, § 101.

(c) Id. § 102.

(1) Vid. 2 Caines, 134. 2 John. 9.

(d) Id. Vid. 7 John. 198. 8 id. 460.

(e) 2 Caines, 134.

(f) 7 John. 198.

(g) 2 Caines, 134.

(h) 4 John. 222.

(i) 2 Caines, 134. 3 id. 275.

1. A challenge to the array is an objection to all the jurors returned by the constable collectively; not for any defect in them, but for some partiality or default in the constable who summoned the jury.(j)

This challenge to the array is two fold, viz. a *principal challenge*, and a *challenge to the favor*. The following are the most usual grounds of a *principal challenge* to the array: viz. that the party nominated any juror summoned; that the constable is liable to be distrained upon by the party, or is his servant, counsellor or attorney, or acts as his advocate,(k) unless indeed the parties agree that he should summon the jury notwithstanding such objection exist;(l) or if the constable be any ways interested, (against the party challenging) in the question to be tried, and this, whether it be in the cause to be tried, or in any other cause, or matter, depending on the same point of controversy; or, if he has been god-father to the party's child, or the party to his, or if either party has brought an action against the constable; or there be any action depending between him, and the party, (whether as plaintiff or defendant) which implies malice, such as slander, battery, and the like. Another cause is, that he is an inhabitant of a town, or a freeman, or member of a corporation or city, which is to be benefitted by a part of the penalty going to the poor, &c.(m) And consanguinity (*relation by blood*) between the constable and party, however remote, is also a principal cause of challenge. Even relationship in the ninth degree, has been held a sufficient objection. So affinity by inmarriage, between the party and the constable's cousin, or the constable and the party's cousin, has been held a ground of principal challenge, but the challenge must show how they are related.(n) Even if strangers make the panel, without the interference of the party in the cause, or his agent or friend, though it be not favourable to one side or the other, yet it is a principal cause of challenge to the array;(o) and Chief Justice Pennington gives this good advice; that the constable should be very careful, and not suffer any person to suggest any thing to him about the panel, and by all means to disregard it, if they should.(p)

The above, and other grounds, which raise such a manifest presumption of partiality as, if true, to set aside the array, are principal causes of challenge.(q) But where the cause is for interest, partiality, or affinity, the party cannot, of course, object or challenge to the array, or to the

(j) Co. Litt. 156, 158. 3 Bl. Com. 359.
 (k) 10 John 107. Cowp. 112.
 (l) 10 John. 107.
 (m) 2 id. 194. 3 Burr. 1847.
 (n) For most of the above causes of challenge, vid. Bac. Abr. tit. Juries, (E)

and cases there cited. Vid. also Grah. Prac. 2d ed. 301, 2.
 (o) Penning. on Small Causes, 167. Co. Litt. 156, a.
 (p) Penning on Small Causes, 167.
 (q) Co. Litt. 156.

polls, unless the bias is against him. It does not lie in his mouth to challenge, because the interest, &c. is in his favor; nor has a justice a right to challenge a panel of jurors, and issue a new venire on his own motion, without an objection by the party, (r) and so, I presume, of any other challenge. But a justice may, on his own motion, challenge and set aside a juror for intoxication; indeed it is his duty to do so, if the intoxication be apparent. 2 Cowen, 430.

A challenge to the array for favor is, for facts, which are not deemed in themselves conclusive evidence of partiality, but which imply at least a probability of bias or partiality in the constable, and from which the triers may infer, that the officer is not indifferent; (s) as if there is a relation by marriage between the cousin or son of the constable, and the party; (t) that the party is subject to be distrained on by the constable; or that the constable hath an action of debt, or the like, against the party; (u) that the constable and party are fellow servants; (v) or the party, servant to the constable; (w) and so of any cause, from which the triers may infer that he is not entirely indifferent between the parties.

If the challenge to the array be found against the party, he may yet have his challenge to the polls; but neither party shall take a challenge to the polls, which they might have had to the array. (x)

2. A challenge to the polls is an exception to one or more of the jurors or talesmen, who have appeared, individually; and this is either a *principal challenge*, or a *challenge to the favor* of the juror, &c. objected to. The same causes, whether principal, or to the favor, which we have seen will set aside the array, are equally valid against the individual juror, so far as they apply. But it is provided by statute that on the trial of every action in which a town shall be a party, or be interested, the electors and inhabitants of such town shall be competent witnesses and jurors, except that in suits and proceedings by and against towns, no inhabitant of either town shall be a juror. (y) So, on the trial of every action in which a county shall be interested, the electors and inhabitants of such county are competent witnesses and jurors. (z) It is further provided by statute that no inhabitant of any town, city, or county, shall be disqualified as a juror or witness in any cause brought to recover any penalty or forfeiture, on the ground that such penalty or forfeiture is to be applied for the benefit of such

(r) 15 John. 469.

(s) Co. Litt. 156. Vid. Grah. Prac. 2d ed. 302.

(t) Id. and vid. Penning. on Small Causes, 169.

(u) Co. Litt. 156.

(v) Dyer, 367, pl. 40.

(w) Cro. Eliz. 581.

(x) Co. Litt. 156, b. Id. 157, b.

(y) 1 R. S. 350, § 4.

(z) Id. 876, § 4.

town, city, or county, or for the benefit of the poor thereof; nor shall any officer, on such ground, be disqualified from serving any process for the summoning of a jury in such cause.(a) In penal actions for the recovery of any sum, it is not a good cause of challenge to the jurors summoned or to any officer summoning them, that such juror or officer is liable to pay taxes in any town or county which may be benefitted by such recovery.(b)

The following are some of the causes of principal challenge to the polls, viz: that the juror does not possess the necessary qualifications prescribed by statute;(c) that he is an alien;(d) (but this is no objection after verdict upon a writ of error,)(e) that he is within the age of twenty-one years;(f) or that he is an idiot or lunatic.(g) But a matter which merely *exempts* a man from serving on a jury, and does not incapacitate him, can never be a cause of challenge; and it is said, that if a person thus *exempted*, be summoned and appear, he cannot excuse himself from serving on the jury, if there be not a sufficient number of jurors without him.(h) The above is called a challenge *propter defectum*. There is another kind of principal challenge to the polls, called challenge *propter affectum*, by reason of some supposed bias or partiality. Thus it is principal cause of challenge, that the juror has before given an opinion on the subject in controversy;(i) but not where he expresses a conditional opinion merely, as when a juror said that, "if the reports of neighbors were correct, the defendant was wrong and the plaintiff was right."(j) It is also principal cause of challenge, that the juror is of kin to either party within the ninth degree;(k) or, according to Lord Coke, however remote the kindred;(l) that there is affinity, or alliance by marriage, between the juror and one of the parties, if such affinity continue, or there be issue of the marriage alive; (for otherwise it would be but a challenge to the favor;(m) so, that the juror's father had married the defendant's brother's widow, the father being dead at the time of the trial, is no ground for principal challenge;(n) that the juror is god-father to the party's child, or the party god-father to the juror's child; that the juror has land which depends upon the same title as the land in question; and so in all other cases where the juror has an interest in the action, direct or collateral;(o) that the juror has

(a) 2 R. S. 454, § 2.

(b) Id. 340, § 58.

(c) Vid. ante, 881, note, 1.

(d) Co. Litt. 156. 6 John. 332. 4 Dall. 353.

(e) 4 Dall. 353.

(f) Co. Litt. 157.

(g) Gilb. C. B. 95.

(h) Vid. Grah. Prac. 2d ed. 303.

(i) 1 John. 316.

(j) 8 Id. 445, But. Vid. 4 Wen. 229.

6 Cowen, 559. 7 Id. 108. 1 John. 316.

1 Cowen, 432.

(k) 3 Bl. Com. 363.

(l) Co. Litt. 157.

(m) Co. Litt. 157.

(n) 7 Cowen, 478, and Vid. note,

(o) Vid. 3 Burr. 1847. 2 John. 194.

5 Mass. R. 90. 2 South. 686.

before given a verdict in the same cause, or upon the same title or matter, though between other parties; that he was chosen arbitrator in the same cause, by one of the parties, and had entered upon an examination of it; but otherwise if he were chosen indifferently by both parties; that he is counsellor, servant or of fee, of either party; (*p*) that he is tenant of either party; (*q*) that he is of the same society or corporation with either party; (*r*) (although, in a recent case, it was held to be no ground of challenge to a juror, that he was a *freemason*, where one of the parties to the suit was a *freemason*, and the other not; (*s*)) but that he is his fellow servant, is but a challenge to the favor; (*t*) that he has taken information of the case, before he is sworn. (*u*) So, also, it is principal cause of challenge to a juror, that since he has been returned, he has eaten or drunk at the expense of one of the parties; (*v*) (but, that one of the parties has lately been entertained at the juror's house, is only matter of challenge to the favor; (*w*)) that one of the parties has labored the juror, and given him money or other thing for his verdict; but if the party only labor the juror to appear and act conscientiously, it is no matter of challenge whatever; that an action, implying malice or displeasure, is pending between the juror and one of the parties; but if not implying malice, &c. it is but matter of challenge to the favor. (*x*) Another kind of principal challenge to the polls is called challenge *propter delictum*: which is an objection that the juror has been convicted of an infamous crime, that is, a crime punishable with death or imprisonment in a state prison; (*y*) but in this case the competency of the juror is generally restored by a free pardon.

The causes of challenge to the polls for favor are indefinite. Jurors should in this respect be free from all manner of exception. (*z*) Such is the purity of our law, that no man shall have his cause tried by a juror, against whom he can raise a reasonable ground of suspicion, as to his indifference. There are a thousand strings by which the human heart may be touched, and passions by which it may be affected, that are not reducible to any general rule. These may bias the mind as much, and sometimes more, than circumstances which raise more evident presumption of partiality. Close and intimate habits of friendship with one of the parties, will frequently cause a stronger bias in the mind, than more open causes; and this is the more dangerous, as it often hath a secret

(*p*) Co. Litt. 157.
 (*q*) Gilb. C. B. 95.
 (*r*) 3 Bl. Com. 363.
 (*s*) 13 Wen. 9. Vid. the remarks of
 C. J. Savage, id. 22.
 (*t*) Co. Litt. 157.

(*u*) 2 Hale, 306.
 (*v*) Co. Litt. 157.
 (*w*) 3 Salk. 81.
 (*x*) Co. Litt. 157.
 (*y*) 2 R. S. 587, § 32.
 (*z*) 2 John. 194.

unknown effect upon the mind that the juror himself is no way sensible of, and therefore takes no pains to guard against. If it can be proved by the conduct or conversation of the juror, that he hath an inclination in favour of one party more than another; or any enmity between the juror and one of the parties; or a family dispute between them, all these and numberless other causes are sufficient to be put to triers, to declare the indifference or unindifference of the juror. Any circumstance which can be raised, showing that the juror is not wholly free from a reasonable suspicion of bias, is sufficient for the triers to set him aside; and this they should do, where they are in doubt as to whether the juror is indifferent.(a) These causes of challenge to the favor, very frequently happen from circumstances which no way impeach the juror. It is no dishonour to be the intimate friend and companion of any man in good credit, nor is it any offence to resent injuries, and differ with a man that treats you ill; nor is it any impeachment of a man, that on two of his neighbors' differing, he should feel an inclination that one should prevail over the other; yet in either of these cases, a person thus circumstanced, cannot be said to stand free from a suspicion of bias.(b) The causes of favor are infinite;(c) and with regard to all cases of challenges to the favor, in the strong and emphatic language of Lord Coke,(d) "The rule of law is, that the juror must stand indifferent, as he stands unsworn."

Concerning the time when a challenge is to be made.

No challenge, either to the array or to the polls, can be made, before a full jury have appeared.(e) If you have divers causes of challenge to the array, or to the polls, they must all be made at once, and cannot be tried separately. If one party challenge, and the juror be found indifferent, the other party may then challenge. After you have taken a challenge to the poll, you cannot challenge the array;(f) but a challenge to the array may be made at any time before one of the jurors sworn, and a challenge to the polls at any time before the juror challenged is sworn;(g) but after he is sworn it is then too late.(h) It is immaterial which party challenges first; but the party who first begins to challenge, must finish all his challenges, before the other begins; otherwise he is precluded from making any other challenges. Also, the challenges of the party who challenged first, shall be first tried.(i)

(a) 4 C. H. Recorder, 81.

(b) Vid. Penning. on Small Causes, 172, 3.

(c) Co. Litt. 157, b.

(d) Id.

(e) 2 Hawk. c. 43, § 1.

(f) Co. Litt. 158, a.

(g) Penning. on Small Causes, 170.

(h) 17 John. 133.

(i) Trials per pais, 144.

Concerning the manner of making, and trying the challenge.

If the challenge be a principal one, either to the *array* or the *polls*, the cause, or facts which are the ground of challenge, must be stated to the justice in writing or by parol, whereupon the opposite party may either take issue by denying the truth thereof, or demur, upon which a joinder in demurrer follows, as in pleading.(j) A demurrer admits the facts, as in other cases, and presents a mere question of law to be determined by the magistrate, and this, whether the challenge be to the array, or to the polls.(k)

A principal challenge, either to the array or to the polls, is tried by the justice alone, on the oath of witnesses, who are sworn in this form :

Form of oath to witness upon trial of a challenge.

You do swear that you will true answer make to such questions as may be put to you, touching the challenge depending.

The juror himself may be sworn and examined to any point, which doth not tend to his infamy and disgrace, to discredit or dishonor him, or subject him to punishment.(l) Thus, he may be asked whether he is a freeholder or not;(m) or whether he hath given his opinion, and the like, but not whether he hath been convicted and punished for an infamous crime.(n) In case the juror is himself sworn, the oath to be administered may be in the following form :

Form of oath to juror upon the trial of a challenge.

You do swear that you will true answer make to such questions as may be put to you, touching your competency as an impartial juror between A. B. plaintiff and C. D. defendant.(o)

If the challenge be to the array, for favor in the constable, the party states to the justice, generally, *that he challenges the array for favor in the constable* ; to which the other party cannot demur, but must take issue upon it. This is then tried in the manner we shall presently notice, and the finding of the triers is, *in terms*, that the constable is either *indifferent* or *not indifferent*, between the parties, which is followed by the judgment of the justice, that the panel be *quashed* or *affirmed*, according to the finding of the triers.

(j) 3 Wood. Lec. 346. n. (1.) and vid. ante, 831 to 834. 6 Cowen, 555. 7 id. 108.

(k) 9 John. 260 7 Cowen, 108.

(l) Co. Litt. 158. 1 Salk. 153. 19 John. 115.

(m) 16 John. 180.

(n) Vid. cases cited Bac. Abr. tit. Juries, (E.) 12. Vid. also Goodwin's Trial, 37, &c. 16 John. 180.

(o) Vid. Goodwin's Trial, 37.

If issue be joined on a challenge to the array, for favor, the justice may, in his discretion, appoint two triers from among the jury or other good men,(p) whose duty it is to try the question presented, and report their finding to the justice.

Form of the oath of triers, on a challenge to the array for favor.

You do swear that you will well and truly try this issue of challenge, to the array of jurors in this suit, between *James Jackson*, plaintiff, and *Richard Roe*, defendant, and a true finding make according to evidence.

If a challenge to the polls be for favor, the party challenging states to the justice, *that A. B., the juror called, is not indifferent between the parties, for which cause he challenges him*; and if the opposite party deny this, the proceeding is as follows: If a juror is challenged before any one of the panel be sworn, two triers shall be appointed as we mentioned before, who shall proceed to try him as above directed; and if he be found indifferent and sworn, he and the two triers shall try the next juror challenged; and as soon as two jurors be found indifferent, the first two triers shall be discharged; and if there be any more challenges, the two jurors tried and found indifferent shall try the rest. If two jurors are sworn before the challenge is made, they are sworn as triers in all cases, but if one be sworn without challenge, and the next be challenged, two triers must be appointed and sworn with the first, who, together with him, constitute the triers; the two persons selected for that purpose to be discharged as before mentioned, on two jurors being found indifferent.(q)

Form of the oath of triers, on a challenge to the polls for favor.

You do swear that you will well and truly try, and truly find, whether *A. B.*, the juror challenged, stands indifferent between *James Jackson*, plaintiff, and *Richard Roe*, defendant, in the issue of challenge about to be tried.(r)

The triers then sit and hear the evidence, the witnesses being sworn, according to the form before given. They ought conscientiously to determine; and if, from the evidence given, they think there is reasonable ground of suspicion, that the juror challenged doth not stand wholly indifferent between the parties, they ought, without doubt or hesitation, to

(p) 9 John. 260.

(q) Vid Penning. on Small Causes, 173, 4. Bac. Abr. tit. Juries, (E) pl. 12, and

cases there cited. Grah. Prac. 2d ed. 307, and the cases there cited.

(r) 1 Salk. 152, pl. 1. Vid. Clerk's Assist. ed. of 1834, p. 246.

find the challenge *true*; and on the other hand, if they think from the evidence that the juror stands entirely free from any reasonable suspicion of bias, they will find the challenge *not true*.^(s)

If a challenge be properly taken, it is the duty of the justice to receive and determine it; and where a challenge is improperly overruled by the justice, though the party afterwards go to trial, it is no waiver of the objection, but the judgment will, notwithstanding, be reversed.^(t)

For a full collection of the English and American cases relating to the subject of challenges, vid. 1 Cowen, 426 to 442, *in note*, from which most of the foregoing remarks are extracted.

Of proceeding, when a sufficient number of jurors appear.

When a sufficient number of unexceptionable jurors appear, after all challenges (if any) are heard and determined, they are next sworn in the the following form :

Form of juror's oath.

You do swear well and truly to try the matter in difference between *James Jackson*, plaintiff, and *Richard Roe*, defendant, and unless discharged by the justice, a true verdict to give according to evidence.^(u)

In conducting the evidence, the party who hath the affirmative begins. This is generally the plaintiff, unless the defendant contents himself with pleading affirmatively some special plea, without joining with it the general issue. After the party thus holding the affirmative, goes through, the adverse party follows; when he is done, the party having the affirmative will be permitted to give evidence to rebut the testimony of his adversary, and impeach the credit of his witnesses; and then the other party the same. In practice, it is usual for one party after the other to examine what witnesses they choose, until they are both through with their evidence.^(v) The statute prescribes the following form of oath to be administered to witnesses:^(w)

Form of oath to be administered to witness.

You do swear, that the evidence you shall give relating to the matter in difference between *James Jackson*, plaintiff, and *Richard Roe*, defendant, shall be the truth, the whole truth, and nothing but the truth.

After the evidence is closed, the parties, by themselves or counsel, may make such observations to the jury as are applicable to their case; the

(s) Penning. on Small Causes, 174.

(t) 1 John. 316.

(u) 2 R. S. 174, § 103.

(v) Penning. on Small Causes, 175.

(w) 2 R. S. 174, § 108.

party holding the affirmative to close the argument.(x) This is the natural order of the trial, either before the justice or jury.

During the trial, after the jury are sworn, the parties may agree to withdraw a juror. This is usually done on the recommendation of the justice, in cases where it is doubtful whether the action will lie, or where the justice intimates an opinion, that under the peculiar circumstances of the case, the action should proceed no further. It was at one time supposed that this could not be done without consent; and on doing so, it was held that each party paid his own costs. It is now, however, well settled that courts may, in the exercise of a sound discretion, allow a juror to be withdrawn, and still retain the cause for trial, instead of nonsuiting a plaintiff for a defect in his proof; as in case of surprise or mistake on his part in the preparation of his cause for trial; and this, even where the defendant has not wilfully misled the plaintiff. It seems also that the withdrawing of a juror by consent, is no bar to a future action for the same cause. And discharging a jury, by consent, does not terminate the suit; and is, in this respect, like the withdrawing of a juror.(y)(1)

After the evidence is closed on both sides, and before the cause is submitted to the jury by the parties, it frequently becomes a question, whether either party may call further testimony in the cause. After the cause is finally submitted either to the justice or jury, it is then clearly too late. At any time before this, or at any time before the counsel on both sides have closed their arguments, it is discretionary with the justice, either to admit, or reject such further testimony; and if such discretion be exercised properly, either in receiving or refusing it, the judgment will not for that reason be reversed. It can never be claimed by either

(1) It is provided by statute, 2 R. S. 158, § 1, that where no special provision is otherwise made by law, justices' courts shall be vested with all the necessary powers which are possessed by courts of record in this state. I have been unable to find any thing in the statute prohibiting, in justices' courts, the well established practice in courts of record of withdrawing a juror, and hence conclude that the practice is applicable to the former courts. There can be no doubt that the benefits and advantages to be derived from the practice apply with as much force to one court as the other. The only difficulty which suggests itself to my mind, is, that the statute has made no express provision for the adjournment of a cause after the trial has commenced, and yet this power is very properly exercised in many cases, from necessity; instance an adjournment upon the issuing of an attachment for a witness, which may, without doubt be done after the trial has commenced, especially if notice of an intention to apply is previously given. So, where a juror is withdrawn, a justice would, from the necessity of the case, be authorized to adjourn the cause; at all events, there would be no impropriety in holding the cause open a sufficient length of time to enable the plaintiff to supply the deficiency in his testimony, say twenty-four hours, or some short period.

(x) *Id.* the cases there cited. *Vid.* also 6 Carr.
 (y) *Vid.* *Grab. Prac.* 2 ed. 291, and & Payne, 230.

party at the trial, as a matter of strict right to open the cause to proof, after full opportunity has been given to each side to be heard, and the testimony has been regularly, and by mutual consent closed. The subsequent admission of testimony must rest in the discretion of the court, duly exercised according to the circumstances of the case.^(z) If the opposite party be present, with his witnesses and proofs, it will be reasonable to receive the additional testimony offered; for then, no injury can result to him; but if, after the party offering the testimony, declares he has done with the examination of witnesses, and the opposite party, or his witnesses have, in consequence of this, left the court, it would be unreasonable to receive such additional testimony, unless the opposite party and his witnesses are first recalled. Witnesses are not bound to stay after the parties have declared that they have done with the proofs, for this is equivalent to a discharge of the witnesses. The admission of the supplemental proof, is in fact a fresh trial of the cause, and unless the party have full opportunity to be present with his witnesses, to repel the testimony, if in his power, he has just cause to complain on the ground of surprise.^(a) On the other hand, where the counsel for the defendant had summed up to the jury, and while the plaintiff's counsel was proceeding to close the argument on his part, the defendant's counsel stated to the judge, that he had just discovered some material testimony on his part, which he offered, but the judge rejected it, supposing that he had no discretion, none of the objections above stated appearing; it was held erroneous, and the verdict accordingly set aside.^(b) There is, perhaps, generally danger of injustice, in allowing the examination of witnesses to be renewed, after both parties have rested. Witnesses, who generally attend with reluctance, and can with difficulty be depended on as being in court on the call of the cause, and during the trial, are apt to seize on such a crisis, as an entire absolution from further attendance, and retire from court. The question whether the examination shall be opened, is, therefore, often very far from standing merely upon a waste of the time of the court, or a mistaken omission, or a new discovery of evidence on the side proposing to open the case. It may work a material wrong to the opposite party, who is thus, perhaps, left unable, even by his own deposition, to explain wherein he is to suffer. To him it is many times of peculiar importance, that all the testimony should be heard, while his witnesses, and his entire means of private and public explanation are present, or within his immediate reach. Yet, in all cases, it is a matter

^(z) 2 John. Cas. 319, per Kent. J.

^(b) 7 John. 306.

^(a) Id.

of discretion with the justice, in any stage of the cause, before the jury shall have retired, to allow the re-examination of witnesses, and perhaps receive additional witnesses; and it is generally taken as quite a hard measure of justice when he refuses.(c)

Occasionally, the delay of a trial, and even the discharge of a jury becomes necessary, in order to complete the examination of a witness. Thus, if a witness be seized with sudden illness, so that a full examination cannot be had, the true course seems to be for the party to move a postponement of the trial, which it is presumed the court may grant, even if it require the discharge of the jury, and a re-trial. But where the cross examination of the plaintiff's witness, after being commenced, was interrupted by a fit, so that it could not be completed, and the plaintiff was prevented from re-examining, yet neither party requesting a postponement, the court refused a new trial, on the application of the plaintiff, who, notwithstanding, chose to go on with the trial, and take the chance of a verdict against him. He complained that he was deprived of all opportunity to re-examine, to certain points coming out on the cross examination, which required explanation by re-examination.(d)

The trial may, as we before observed, be intercepted by a non-suit as mentioned ante, 879, 880. This must be before the cause is finally submitted to the jury. The justice has no right afterwards, to order the plaintiff non-suited.(e) The room for the hearing of the cause should be kept quiet, and the jury afforded every facility for hearing the cause, possible. They should be kept as distinct as may be, from the interference of either the parties or strangers; and it was held in one case, that where the justice permitted the jury to be treated with spiritous liquor during the trial, though it was with the consent of both parties, this was irregular, and the verdict and judgment were set aside, on certiorari, for this cause.(f)

In case there is no non-suit, after the evidence is closed, and the parties, or their counsel have finished their observations, the jury may, if they please, give their verdict immediately without retiring to deliberate.(g) But, in all cases, where any doubt or difficulty can possibly arise, it is best for the jury to take some time to deliberate on the evi-

(c) Cowen & Hill's Notes to Phil. Ev. pp. 716, 717, &c. and the cases there cited.

(d) Id.

(e) 3 John. 430. Penning. on Small Causes, 175. But after the cause is submitted to the jury, and when they return to deliver their verdict, the plaintiff may

withdraw and submit to a non-suit before the verdict is pronounced. This, however, he cannot do, when there is no jury, and the cause is finally submitted to the justice. Vid. ante, 879, 880.

(f) 15 John. 455.

(g) 8 id. 437.

dence, in which case they must be alone. For this purpose, a constable is sworn, according to the form prescribed by the statute,^(h) which we shall presently give. In all cases where the jury retire, it must appear that a constable was sworn to attend them, unless otherwise agreed, or it will be error.⁽ⁱ⁾

Form of constable's oath, on retiring with jurors.

You swear in the presence of Almighty God, that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial, together, in some private and convenient place, without any meat or drink, except such as shall be ordered by me; that you will not suffer any communication, orally or otherwise, to be made to them; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed on their verdict, until they shall be discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed on.

It is proper to notice here, with regard to these oaths to the jury, witnesses, and constable, the forms of which are given by the statute, that it was formerly held error, where they were not administered word for word, according to the form prescribed. This decision grew out of the great strictness of the common law, in requiring a rigid adherence to statute forms; and where a justice in his return mis-recited the form of the constable's oath, the judgment was for that reason alone reversed.⁽¹⁾ To remedy this, the statute, 1 R. L. of 1813, p. 397, sec. 17, was passed, which rendered it necessary, that the party alleging such defect for error, should object at the time the oath was administered, and unless that was done, the judgment would not be reversed for such cause.^(j) This last mentioned act has not been, in terms, re-enacted in the revised statutes, but enough appears from the various provisions scattered through the statute book, to show that such was the evident intention of the legislature. Vid. 2 R. S. 185, § 181. Id. 343, § 4. Id. 344, § 7. Id. § 8. Vid. also 2 Halst. 344, where it was held, in New-Jersey, independent of any statutory provision of the kind above mentioned, that where the justice administers the form of oath usually administered in courts of justice, it is sufficient, though he has not pursued the precise form prescribed by the statute.⁽²⁾

(h) 2 R. S. 174, § 109.

(i) 11 John. 532.

(1) 2 Caines, 134.

(j) 3 John. 430.

(2) Vid. on this subject, Cowen & Hill's Notes to Phil. Ev. p. 705.

If the jury do not retire, a constable need not be sworn to attend them.(k) And it is erroneous to swear any other person to this charge, when they do retire,(l) unless indeed the parties agree to this, which if they do, or agree that they may retire without any person to attend them, this will take away the error.(m) And if they agree that the jury may retire without any constable to attend them, neither party can afterwards object to the verdict, on certiorari, because the jury eat, drink, or admit other persons to their room.(n)

After the jury have retired, it is their duty to continue together, until they return into court, without having any communication with any person, either on the subject of the case, or any other subject; although where two jurors, (after the jury had retired to consider of their verdict,) separated from their fellows, and were gone some hours, but returned, and joined in the verdict, there appearing to have been no probability of abuse, the court refused to set aside their verdict.(o) So, if a juror leave his seat, for a short time, without the knowledge of the court, or parties, but no testimony is given during his absence, and he holds communication with no one, on the subject of the cause, though this is a contempt of the court, it does not avoid the verdict.(p) So, where, after a jury had retired, to deliberate on their verdict, they sent for the justice and asked him whether they could add any thing to the charge of the plaintiff, and he answered *no*, and left them without any thing further being said, this was held not to be an irregularity, for which the verdict could be set aside.(q) And, as a general rule, the mere separation of a jury, after they have agreed upon their verdict, unless there be some suspicion, (and the slightest is sufficient) of abuse, will not prejudice the verdict;(r) but if they eat or drink at the expense of the party, for whom they find a verdict, it avoids the verdict.(s) So where a juror, after the cause was committed to the jury, drank brandy, though in a trifling quantity, and as he stated, to cure the *diarrhœa*, it was held, that the verdict should be set aside;(t) and in this case the court observe: "We cannot allow jurors, thus of their own head, to drink spirituous liquor, while engaged in the course of a cause. We are satisfied that here has been no mischief: but the rule is absolute, and does not meddle with consequences. Nor should exceptions be multiplied. We have set aside verdicts on error, for this cause, even where the parties consented that the jury

(k) 8 John. 437.

(l) 2 Caines, 221.

(m) 11 John. 134.

(n) *Id.*

(o) 1 Cowen, 221.

(p) 3 *id.* 355.

(q) 5 John. 111.

(r) 2 Cowen, 589. 4 *id.* 26.

(s) Co. Litt. 277. 4 Barn. & Adolph. 681.

(t) 7 Cowen, 562.

should drink." So, where a jury procured their separation, by pretending to the constable that they had agreed upon a sealed verdict, when in truth they had not, and conversations out of doors were afterwards carried on in the presence of some of them, relative to the suit, by persons not on the jury; and on assembling, they were sent out again, though this was objected to by the plaintiff; and then they returned with a verdict for the defendant, it was held, that the verdict should be set aside;(u) but where a jury separated, after agreeing on a sealed verdict, and on coming into court one of them dissented, but subsequently on the jury being sent out again, agreed on the verdict, the verdict was held good.(v) So, also, it is irregular for a jury, each to put down a sum which they find for the plaintiff, add the sum together, divide it by the number of jurors, and adopt the quotient as their verdict;(w) but if it be merely adopted, as a mode of arriving at a reasonable measure, without binding themselves to abide, at all events, by the contingent result, the verdict is good.(x) See, also, as to the irregularities and misconduct of jurors, and their effect upon the verdict, Graham on New Trials, 61 to 131.

The foregoing remarks in regard to the conduct of jurors, are extracted from Grah. Prac. 2d. ed. 313 to 315. Vid. also on the same subject, 1 Cowen, 221 to 237, in note.

The jury, in a justice's court, have a right to decide both the law and the fact, subject to a review upon certiorari, if they decide erroneously.(y) And the law of trial by jury in other courts, applies to this.(z) Accordingly, after going out of court, they shall have no evidence with them except what was shown to the court, as evidence upon the trial; nor even this, without the direction of the court. The justice may permit them to take to their room letters patent, and deeds under seal, and exemplifications of evidence given in the court of chancery, if the witnesses who gave such evidence be dead;(a) and so any *public* documents, which are evidence of themselves;(b) and by parity of reason, I presume, exemplifications of records, and a justice's certificate duly authenticated to prove a proceeding before him. With the consent of parties, they may take with them books or writings, not under seal;(c) or even if, they take them without such leave or consent, that circumstance, however irregular, will not avoid the verdict.(d) If they examine a

(u) 5 Cowen, 283, and vid. 1 id. 221, note. 1 Chit. R. 401, and the cases cited 4 Cowen, 26 to 39.

(v) 2 Wen. 352.

(w) 1 Cowen, 238. 3 Caines, 57. 15 John. 87. 10 Wen. 595.

(x) 4 John. 437.

(y) 3 John. 436.

(z) 7 id. 32.

(a) Bull. N. P. 306.

(b) Cro. Eliz. 411.

(c) Id. 1 Ld. Raym. 148. 2 Salk. 645.

(d) Co. Litt. 227, b.

witness by themselves, though the same evidence which was given in court, it would avoid the verdict; (e) but they may come back into court to hear the evidence of a thing whereof they are in doubt. (f) If a party, or any one for him, deliver a letter or other writing to the jury, it shall avoid the verdict; (g) but not so, if the jury do not look at it; (h) nor if delivered by the opposite party, or produced by one of the jurors, without having received it from either of the parties. (i) The justice, after the case has been summed up, and the jury have retired, should not permit them to see a treatise on the law of the subject, even with the consent of parties; they should state their difficulty to the justice, and receive his direction as to the law. (j) (This rule is perhaps inapplicable to juries in justices' courts, as they are made the judges of both the law and the fact.) The jury should be particularly careful while out, not to suffer either party, nor even strangers to have any kind of communication with them; nor should they suffer any facts detailed by one of their number, that have not by him been given in evidence at the trial, in the presence of the parties and justice, to have any weight in their determinations; (k) for every man ought to know what testimony is brought against him, that he may have an opportunity to rebut it by counter evidence, or explain it by circumstances. (l) And, accordingly, it has been repeatedly ruled by the supreme court, that a justice cannot decide from his own previous knowledge, but only on evidence produced before him in court. (m) If the jury are desirous of hearing a witness re-examined, or receiving some explanation of a piece of testimony, about which there is a misunderstanding among them, or, in case they should wish the advice of the justice on a question of law, they can come before the justice, on application to him for this purpose, (n) in which case, the parties must be present, or at least have notice, and then if either of them refuse to attend, the verdict will be regular, even though the witness be sent into the jury room. (o)

It is irregular for the justice to tell the jury what a piece of testimony was, after they have returned, without the parties being present. (p) But where, as was above mentioned, the jury merely asked the justice, if they could add any thing to the plaintiff's demand, to which he answered *no*, this was held not a sufficient cause to set aside the verdict, though

(e) Cro. Eliz. 189.

(f) Co. Litt. 227.

(g) Co. Litt. 227.

(h) 3 John. 252.

(i) Cro. Eliz. 616.

(j) 3 Car. & Payne, 310.

(k) 2 Bl. Com. 374, 5.

(l) Penning. on Small Causes, 177.

(m) 3 John. 189. 10 id. 250.

(n) 7 id. 32. Penning. on Small Causes, 177.

(o) 7 John. 200.

(p) 10 id. 239.

the parties were absent, and not notified to attend.(q) And a witness may be privately examined by the jury, with the consent of parties.(r) In no case can the justice go and confer with the jury, unless by consent of parties; and if he do so, no matter what he says to them, be it right or wrong, it is error, for which the judgment will be reversed; and, in such case, the consent of parties to such a proceeding cannot be inferred from their silence. It is error, unless they consent expressly, and in terms.(s)

If the justice is satisfied that the jury cannot agree on their verdict, after having been out a reasonable time, he may discharge them, and shall issue a new venire, returnable within forty eight hours, unless the parties consent that the justice may render judgment on the evidence already before him; which in such cases he may do.(t) In a late case, the supreme court regarded the power of discharging a jury, as entirely discretionary with the court; and were a jury were discharged after thirty minutes deliberation, it was considered that it could not be reviewed on error; and Savage, C. J. remarked, that "in such cases, great caution and prudence are necessary. Juries should not be discharged, because upon the first comparing of opinions, there happens to be a disagreement. Temperate discussion may produce unanimity, and time should be allowed for that purpose; but when such time has been allowed, and the court become satisfied, that there is no reasonable prospect of an agreement, by further discussion, it then becomes their duty to discharge."(u)

Of the verdict.

This is the finding of the jury. It must, in all cases, be general for the plaintiff, or defendant; and the jury cannot, in this as in a court of record, find a special verdict, stating the facts, and leaving it to the justice to give judgment thereon.(v)

But when double or treble damages are given to the party by a statute, as in trespass for cutting wood, &c., without leave of the owner, &c., 2 R. S. 261, § 1, and the plaintiff declares upon the statute,(w)(1) the jury

(1) We stated ante, 656, that the declaration under the statute cited, should conclude in the general form, "*Contrary to the form,*" &c. This is perhaps enough. It may however be considered doubtful, whether a particular reference to the statute is not necessary. If so, the following form of conclusion should be adopted: "*Contrary to Title 6, Chap. 5, of Part 3, of the Revised Statutes of the state of New York.*" Vid. 8 John. 342. 1 Cowen, 176. 8 id. 115.

(q) 6 id. 111. (u) 13 Wen. 55. Vid. Grah. Prac.
 (r) 12 id. 384. 2d d. 316.
 (s) 13 id. 487. (v) 13 John. 249.
 (t) 2 R. S. 175, § 111. Vid. also 2 (w) Ante, 656, 7.
 John. Cas. 275. Id. 301. 18 id. 187.

should find the facts specially, which bring the offence within the act. For instance, under the statute cited, the jury should find the defendant guilty, and that the trespass was committed without the leave of the owner of the land, &c., that the same was not casual and involuntary, and that the defendant had not probable cause to believe that the land on which he committed the trespass, was his own, &c.; and state that they find single damages. In such case, the court may then treble the damages in the judgment; that is, multiply them by three.(x) Or, instead of finding the facts specially, the jury may state in their verdict, that they find *so much*, as the treble damages due by the statute, which is perhaps the preferable mode; and the court will imply that their verdict is for *treble* damages, unless they expressly find to the contrary.(y)

When the jury return into court, the justice will call over their names, and if they all appear, the plaintiff should then be called;(z) for any time before the verdict is rendered, he may suffer a non-suit; and if the plaintiff, or any one for him, should not appear, the justice will give judgment of non-suit against him, and cannot receive the verdict.(a) If the plaintiff appear, the justice will then say, *Gentlemen, have you agreed on your verdict?* To which the foreman answers in the affirmative. The justice will then say, *Who do you find for?* To which the foreman answers, *We find for the plaintiff or defendant, so much.* The justice, after noting the verdict, will then say, *Listen to your verdict, as the court has recorded it. You say you find, &c.* (repeating the verdict) *and so say you all.* If no one dissents, this must be the verdict in the cause.(b) No matter what the form of the verdict, if it be substantially in favor of the party. The justice must render judgment upon it. Thus, should the jury find no cause of action, this is substantially a verdict for the defendant.(c) So if, where the defendant claims no set off, the jury find six cents damages, and six cents costs for him, it is a verdict generally for the defendant, and the six cents damages are to be rejected as surplusage.(d) And where a jury found eight cents for the defendant, the supreme court intended, or presumed a set off, in order to help it, though none appeared on the return.(e) So a verdict for the plaintiff, for more than he claims, is a mere formal defect.(f) A justice can, in no case, grant a new trial, in order to rectify the verdict, be it never so informal.(g) The only

(x) 2 T. R. 159. 1 Chit. R. 141, n. Grah. Prac. 2d. ed. 320.

(y) 1 Cowen, 175.

(z) 2 R. S. 175, § 110.

(a) Id. id. 176, § 119.

(b) Penning. on Small Cases, 177, 8.

(c) 2 John. 181. Ante, 726.

(d) 3 John. 427.

(e) 2 Caines, 138.

(f) 3 John, 432.

(g) 2 id. 181.

remedy in *his* court is, to request the jury to amend it, before it is recorded, in the manner we are proceeding to remark.

The jury may, at any time before their verdict is recorded, correct it, either in form or substance. They may do this of themselves, or on the suggestion and advice of the justice. They may do it immediately, on discovering or being apprised of the mistake, or may retire a second time, and make the correction on more mature deliberation at their room. To determine whether the jury are unanimous, (as they must be in their verdict,) either party has a right to have the jury polled, (unless he have expressly assented to waive the right,) in which case the justice must call them over one by one, and ask if the verdict pronounced be their's, thus: "*Is this your verdict?*" If it turn out that any one of the jurors disagree with his fellows, it is no verdict, and the jury may be sent out again. If they are not polled, and the justice think the verdict palpably incorrect, he may himself send the jury back to reconsider it. And in one case, where they were thus sent back by the justice, and altered a verdict, which was for the defendant, into a verdict of twenty-four dollars for the plaintiff, it was held well, and the judgment affirmed.^(h) The jury may disagree to a verdict, which they have written and sealed up, and may be polled in relation to such a verdict, as well as any other;⁽ⁱ⁾ and it makes no difference in this respect that the parties agreed that they might seal up their verdict, and deliver the same in this form;^(j) for a verdict is not final, until pronounced and recorded in open court.^(k)

Where the jury are empaneled before Sunday commences, it is proper to receive the verdict on Sunday, if the jury do not agree before; but the justice must wait till the next day before he enters judgment thereupon, or it will be reversed.^(l)

(h) 7 John. 32, and vid. Penning. on Small Causes, 178. 6 John. 68. 2 Wen. 619. 3 John. 255. 2 Wen. 352.
(i) 3 John. 255.

(j) 6 id. 68.
(k) Id. 7 id. 32.
(l) 15 id. 119. Ante, 493

SECTION VI.

OF PROCEEDINGS AGAINST A JUROR, FOR NOT APPEARING UPON A VENIRE.

It is provided by statute, that every person who shall be duly summoned as a juror, and shall not appear, nor render a reasonable excuse for his default; or appearing, shall refuse to serve; shall be subject to the same fine, to be prosecuted for and collected, with costs, in the same manner, and applied to the same use, as provided in respect to a person subpœnaed as a witness, and not appearing, or appearing and refusing to testify.^(m)

We gave ante, 864 to 867, the provisions of the statute, together with the necessary forms which relate to proceedings against witnesses for their non-attendance or refusal to testify. Most of our remarks under that head will apply to proceedings against a defaulting juror. A summons is first to be issued against the juror in the following form :

FORM OF SUMMONS AGAINST A DEFAULTING JUROR, TO SHOW CAUSE, &c.

SARATOGA COUNTY, ss. The People of the State of New-York : To any constable of said county, *Greeting* :

We command you to summon *John Doe*, to appear before the undersigned, a justice of the peace, in and for said county, at his dwelling house in the town of Saratoga Springs, in said county, on the 19th day of November inst., at one o'clock in the afternoon, to show cause why he should not be fined, according to law, for his non-attendance as a juror before the said justice, (*or before Ransom Cook, Esq. a justice of the peace in and for the said county,*) at his dwelling house in the said town, on the 12th day of November inst., in a certain cause then depending before the said justice, (*or before the said Ransom Cook, Esq. such justice as aforesaid,*) in which *James Jackson* was plaintiff and *Richard Roe* defendant, and have you then there this precept. Given under the hand of the said justice this 16th day of November, 1840.

JOHN B. GILBERT, *Justice*.

The summons is to be served and return made in the same manner as that against a defaulting witness. Vid. ante, 866. We saw ante, 862,

(m) 2 B. S. 175, § 112.

that the return of the constable is, *prima facie*, sufficient evidence of the juror being summoned. The cause or excuse shown, may be by the juror's own oath, the rule being the same in this case as that of a witness, as we have just seen. Vid. ante, 865.

FORM OF MINUTE OF CONVICTION OF DEFAULTING JUROR.

SARATOGA COUNTY, ss. Be it remembered, that on the 19th day of November, 1840, *John Doe* is convicted before me, and fined the sum of *ten dollars*, besides *two dollars* costs, for non-attendance as a juror before me, (or before *Ransom Cook, Esq. one of the justices of the peace of said county,*) at my (or his) dwelling house, in the town of *Saratoga Springs*, on the the 12th day of November inst., in a certain cause then and there depending before me, (or before the said justice,) in which *James Jackson* was plaintiff, and *Richard Roe* defendant.

JOHN B. GILBERT, Justice.

FORM OF EXECUTION FOR FINE AND COSTS,

Against a defaulting juror.

SARATOGA COUNTY, ss. The People of the State of New-York: To any constable of said county, Greeting :

Whereas *John Doe* was, on the 19th day of November, 1840, convicted and fined by the undersigned, a justice of the peace in and for the said county, the sum of *ten dollars*, besides *two dollars* costs, for non-attendance as a juror before the said justice, (or before *Ransom Cook, Esq. one of the justices of the peace of the said county,*) at his dwelling house, in the town of *Saratoga Springs*, in said county, on the 12th day of November inst., in a certain cause then and there depending, before the said justice, (or before the said *Ransom Cook, Esq. such justice as aforesaid,*) in which *James Jackson* was plaintiff, and *Richard Roe* defendant ; a record of which conviction, and of the cause thereof, has been duly made up and entered in the docket of the undersigned. And whereas the said *John Doe* has neglected to pay the said fine and costs :

You are hereby commanded to levy the said fine and costs of the goods and chattels of the said *John Doe* ; and for want thereof, to take and convey the said *John Doe* to the jail of the said county, there to remain until he shall pay such fine and costs. And the keeper thereof is required to keep the said *John Doe* in close custody in said jail, until the fine and costs aforesaid be paid, or until thirty days after the commencement of his imprisonment. Given under the hand of our

said justice, at the town of Saratoga Springs, on the 19th day of November, 1840.

JOHN B. GILBERT, *Justice.*

The mode of levying this warrant or execution, the power of the justice to convict, and his protection against a prosecution for the same, are in all respects similar to what we noticed ante, 867, in regard to proceedings against a defaulting witness.

CHAPTER IX.

Of Contempt of Court, and how punished.

SECTION I.

OF THE JUSTICE'S POWER TO PUNISH FOR A CONTEMPT.

SOMETHING was said on this subject ante, 35, 36, under the head of jurisdiction. Irrespective of the statutory provisions there referred to, which we shall presently notice at large, this court, and indeed all courts, have power, while in the exercise of their lawful functions, to preserve order, decency and silence; for without this power no tribunal can exist.⁽ⁿ⁾ At common law, therefore, this power was held to be incident to every court,^(o) and not confined to courts of record.⁽¹⁾ In *Sparks, v. Martin, Ventris*, 1, the court of King's Bench resolved (on the question directly arising in relation to courts not of record,) in these words, "*They may punish one that resists the process of their court, and may FINE AND IMPRISON, for a contempt to their court, acted in the face of it, THOUGH THEY ARE NO COURT OF RECORD.*" And how far a single magistrate, sitting as a court, enjoys, at common law, the right to commit for a contempt, and the effect of a conviction thereof, was very fully discussed in *Lining v. Bentham*, 2 Bay, 1, in the constitutional court of appeals of *South Carolina*. On the return of a warrant for a breach of the peace, against one Duncan, the justice refused to take the bail offered,

(1) The revisers, in their note to the section of the statute which confers upon justices the power of punishing for a contempt, remark: "From the cases in *Ventris*, p. 1; 1 Bay's Rep. p. 1; and 10 John. 393, it seems settled, that justices have the power, in some cases, to fine and imprison for contempts. The strongest of reasons require that this power should be defined, and its exercise regulated." They therefore reported several sections for that purpose which were enacted.

(n) 1 Str. 420. 1 Chit. Cr. Law, 88, S. C. U. S. reported in Niles' Register, Vol. 20, p. 73. 1 Dall. 329.

(o) Vid. the remarks of Johnson, J. in

upon which Lining got into a violent passion, and accused the justice of gross partiality, and abuse of power in his office of magistrate, accompanied with very abusive and disrespectful language to his face, and in the presence of a number of by-standers. The justice drew up a commitment for a contempt, and committed Lining to the common jail for this contemptuous behaviour. Lining brought an action against the justice, and Duncan was admitted as a witness, and swore that the facts stated in the commitment were untrue, and a verdict was taken for the plaintiff; but the court set aside the verdict, and determined that the commitment drawn up by the justice was conclusive evidence in his favour; and that the justice was not amenable in an action for a judicial act of this nature, but only on an indictment for oppressive or corrupt conduct.(p) In delivering their opinion in this case, the court remark: "With regard to the power of a magistrate to commit for insults or contempts offered to him while in the due execution of his office, it is incidental to magisterial authority; and without such power, he could never vindicate or support the laws, which are entrusted to his management, and over which he has jurisdiction. That a magistrate sitting in judgment touching a matter within his jurisdiction, constituted a court in law, though an inferior one, and he was bound to protect the authority of such court. And one general principle, incidental to all courts, as well superior as inferior, was a power to commit for contempts, either by *word or deed*, offered in the presence of the judge, and in the face of such court. And this is not against *magna charta* or the law of the land, but forms a part of the common law, which is recognised by the terms of our constitution. 5 Vin. tit. Contempts, 447. Lill. Pract. Reg. 305. Gilb. Hist. C. B. 20, 21. 2 Hawk. 96, 112, 113." In the same case, the court further remark: "It is clearly laid down in all the books of authority upon this head, that if any contempt is shewn to the authority of a magistrate, or insult offered to his face, while in the execution of his office, he may act as a judge in such cause and commit the offender; though he may proceed less summarily, if he pleases, by indictment. The true rule of distinction seems to be this, that where contentious words are spoken, or other insult is offered to a justice of the peace, and in his presence, he may commit; but when spoken behind his back, he ought to proceed by indictment. 3 Burn, 33. Salk. 698. 3 Mod. 139. 2 Show. 207.(q)

The statute provides,(r) that in the following cases, and in no others,

(p) S. P. 8 John. 44. Vid. ante, 407. (q) Vid. 2 Bay, 385. 2 McCord, 110. 3 Caines, 170. 10 John. 393. Ante 35, 2 Browne's R. 137.
86. (r) 2 R. S. 199, § 274.

a justice of the peace may punish, as for a criminal contempt, persons guilty of the following acts: 1. Disorderly, contemptuous or insolent behavior towards such justice, while engaged in the trial of a cause, or in the rendering of any judgment, or in any judicial proceedings, which shall tend to interrupt such proceedings, or to impair the respect due to his authority: 2. Any breach of the peace, noise or other disturbance, tending to interrupt the official proceedings of a justice: 3. Resistance wilfully offered by any person, in the presence of a justice, to the execution of any lawful order or process, made or issued by him.

Punishment for contempts, in the foregoing cases, may be by fine not exceeding twenty five dollars, or by imprisonment in the county jail not exceeding five days, or both, in the discretion of the justice. But no person shall remain imprisoned for the non-payment of such fine, more than ten days.^(s)

The refusal of a witness to be sworn or to testify is, in fact, a contempt of court, although not so called, in terms, by the statute.^(t) We have therefore reserved the consideration of that subject for this, its appropriate head.

SECTION II.

MODE OF PROCEEDING TO PUNISH FOR A CONTEMPT.

No person shall be punished for a contempt before a justice, until an opportunity shall have been given him to be heard in his defence. And, for that purpose, a justice may issue a warrant to bring the offender before him.^(u) A warrant need not be issued, unless the person committing the contempt leaves the presence of the justice, before being called upon to answer for his offence. He may, if present, be summarily arraigned by the justice, and proceeded against the same as if a warrant had been previously issued and he arrested and brought before the magistrate. The warrant may be in the following form:

^(s) Id., § 275.
^(t) Id. 200, § 279, 280.

^(u) 2 R. S. 200, § 276

FORM OF WARRANT TO ANSWER FOR A CONTEMPT.

SARATOGA COUNTY, }
Town of Saratoga Springs, } ss.

The people of the state of New York: To any constable of the said county, GREETING:

We command you to apprehend *John Smith*, and bring him before JOHN B. GILBERT, Esq. one of the justices of the peace of the said county, at his dwelling house in the said town, to show cause why he the said *John Smith* should not be convicted of a criminal contempt, alleged to have been committed on the *twenty eighth* day of *November instant*, before the said justice, while engaged, as a justice of the peace, in judicial proceedings. Witness our said justice, at the town aforesaid, the 30th day of November, 1840.

JOHN B. GILBERT, *Justice*.

Upon this warrant the offender is arrested by the constable and brought before the justice issuing it, who thereupon states to him the particular circumstances of the offence with which he is charged, and calls upon him for his defence. If he refuses to make any, or makes an unsatisfactory one, the justice proceeds to convict him of the contempt. As this power is, necessarily, an arbitrary one, the justice should proceed with great prudence and caution. He should bear in mind that he is not engaged in vindicating his own character, or reputation, so much as in promoting the respect due to the proper administration of the laws and to the court of which he is an officer. This consideration alone should induce him to receive as satisfactory any reasonable apology for the offender's conduct; but if he refuse to render such an apology, the justice should not hesitate to inflict upon him such punishment as he may deem commensurate to the offence committed. The statute provides that upon convicting any person of a contempt, the justice shall make up a record of such conviction, stating therein the particular circumstances of the offence, and the judgment rendered thereon, which shall be subscribed by him, and filed in the office of the county clerk, within ten days after its date.(v) The record of conviction may be in the following form:

FORM OF RECORD OF CONVICTION FOR A CONTEMPT.

SARATOGA COUNTY, SS. Whereas, on the *twenty eighth* day of *November instant*, while the undersigned, one of the justices of the peace of the

town of Saratoga Springs, in the said county, was engaged in the trial of (or, *in the rendering of judgment in*) a cause between *James Jackson*, plaintiff, and *Richard Roe*, defendant, in said town, according to the statute in such case made and provided, *John Smith*, of the town of *Saratoga*, in the said county, did contemptuously, insolently and in a disorderly manner so behave and conduct himself towards the undersigned, as to interrupt the said proceedings and to impair the respect due to the authority of the undersigned, by declaring in a loud voice, that the said defendant, *Richard Roe*, could not have justice done him in a court held by the undersigned : (or, *that the undersigned lied ; or, on being admonished to take off his hat, that he did not value what the undersigned could do ; or, that the undersigned was forsworn ; or a fool ; or, that if the defendant could not have justice here, he could get it elsewhere ; or the like :*) (If the offence be within the second subdivision of the section cited ante, 909, then say, after the words "*Saratoga in said county,*" *was guilty of making a great noise and disturbance, tending to, and which did interrupt the said proceedings, by loud and boisterous conversation with divers other persons in the presence and hearing of the undersigned, while so engaged as aforesaid, and, on being requested to desist therefrom, refused to do so :*) and whereas the said *John Smith* was thereupon required, by the undersigned, to answer for the said contempt, and show cause why he should not be convicted thereof : (or, *and whereas the said John Smith was brought before me, and required to answer for the said contempt, and show cause why he should not be convicted thereof :*) and whereas the said *John Smith* did not show any such cause, or make any defence against the said charge : Be it therefore remembered, that the said *John Smith* is adjudged to be guilty, and is convicted of the criminal contempt aforesaid before the undersigned, and adjudged by the undersigned to pay a fine of *twenty five* dollars, and be imprisoned in the common jail of said county, for the term of five days, and until such fine be paid, or he be discharged from imprisonment according to law. Dated the 30th day of November, 1840.

JOHN B. GILBERT, *Justice.*

The statement of the offence, which should be set forth with great particularity, will of course vary according to the circumstances of each case. The above precedent will give the justice an idea of the general manner in which the record should be drawn. We have omitted to give the form of stating an offence under the *third* subdivision of the section cited ante, 909. Such cases are extremely rare. If any such should happen, the manner of setting forth the particulars of the offence will readily occur.

After drawing and subscribing the record of conviction, which is, as we have seen, to be filed in the office of the county clerk within ten days from its date, the justice, (in case the offender is to be punished by imprisonment, or in case he neglects to pay the fine imposed,) proceeds to make out the warrant of commitment, which is declared by the statute to be void, unless it sets forth the particular circumstances of the offence. Vid. 2 R. S. 200, § 278. It may be in the following form :

FORM OF WARRANT OF COMMITMENT FOR A CONTEMPT.

SARATOGA COUNTY, }
Town of Saratoga Springs, } ss.

The people of the state of New York: To any constable of said county, and to the keeper of the common jail of the said county,
GREETING :

Whereas, &c. (*here recite the record of conviction down to and including the word "Charge" in italics, and then proceed as follows :*)

And whereas the said John Smith was thereupon adjudged to be guilty, and was convicted by the undersigned of the criminal contempt aforesaid, and was adjudged to pay a fine of twenty-five dollars, and be imprisoned in the common jail of said county for the term of five days, and until such fine be paid, or he be discharged from imprisonment according to law.

Therefore you, the said Constable, are hereby commanded to take, convey, and deliver the said *John Smith* into the custody of the said Keeper of the said jail ; and you the said Keeper, are hereby required to receive the said *John Smith* into your custody in the said jail, and him there safely keep, during the said term of five days, and until he pay the said fine, or be duly discharged according to law. Hereof fail you not. Dated the 30th day of November, in the year 1840.

JOHN B. GILBERT, Justice

SECTION III.

OF PROCEEDINGS AGAINST A WITNESS FOR REFUSING TO BE SWORN, &c.

It is provided by statute, that when a witness attending before any justice, in any cause, shall refuse to be sworn, in any form prescribed by law, or to answer any pertinent or proper question, and the party at whose instance he attended, shall make oath that the testimony of such

witness is so far material, that without it he cannot safely proceed in the trial of such cause, such justice may by warrant commit such witness to the jail of the county.(x) Such warrant shall specify the cause for which the same is issued; and if it be for refusing to answer any question, such question shall be specified therein; and such witness shall be closely confined pursuant to such warrant, until he submit to be sworn or to answer, as the case may be.(y) The justice shall thereupon adjourn such cause at the request of the party in whose favor such witness attended, from time to time, until such witness shall testify in the cause, or be dead or insane.(z)

In order to justify the commitment of a person present in court, but who refuses to be sworn as a witness, the justice should require evidence of his having been duly subpoenaed; for, until this is done, he is a mere stander by, and cannot be compelled to testify.(a) If, however, in such a case, he submit to be sworn, and then refuse to answer any pertinent or proper question, he may be proceeded against in the manner pointed out by the statute; for the suffering of himself to be sworn as a witness, would be deemed a waiver of his right to require the service of a subpoena. To authorize a proceeding under the provisions of the statute above cited, the witness must, in all cases, be in *actual attendance* before the justice; and cannot be committed except upon the oath of the party at whose instance he attended. If the witness refuse to be sworn, and does not admit due service of the subpoena, the justice should require, preliminarily, evidence that service has been made. This may be in either of the ways pointed out ante, 862, or it may be by the simple oath of the party, without an affidavit. The justice will then proceed to administer the additional oath required by the statute, which may be in the following form:

Form of oath to be administered to the party.

You do swear that you will true answer make to such questions as may be put to you, touching the materiality of the testimony of *John Smith*, a witness in the cause now on trial before me, between *James Jackson*, plaintiff, and *Richard Roe*, defendant.

Under this oath, if the party state that the testimony of the witness is so far material, that without it he cannot safely proceed in the trial of

(x) 2 R. S. 200, § 279.

(y) Id. § 280.

(z) Id. § 281.

(a) Vid. ante, 860. Vid. Cowdell
Hill's notes to Ph. Ev. 23.

the cause, and the witness still refuses to be sworn, or, if sworn, to answer any pertinent or proper question which may have been proposed to him, it becomes the imperative duty of the justice to commit the witness to jail, by a warrant of commitment, which may be in the following form :

FORM OF COMMITMENT OF WITNESS FOR REFUSING TO BE SWORN, &c.

SARATOGA COUNTY, }
Town of Saratoga Springs, } ss.

JOHN B. GILBERT, a justice of the peace of said county : To any constable of said county, and to the keeper of the common jail of said county,
GREETING :

Whereas on the trial of a cause before me, the said justice, this day, between *James Jackson*, plaintiff, and *Richard Roe*, defendant, *John Smith*, being called as a witness on the part of the said plaintiff, (or defendant) and being present, and admitting that he had been duly subpoenaed to attend the said trial as a witness on the part of said plaintiff, (or defendant,) (or, and it being proven to me by the oath of said plaintiff, or defendant, or, by the oath of *John Styles*, or, by the return of *G. C. Loomis*, one of the constables of said county, that the said *John Smith* was duly subpoenaed &c.) refused to be sworn, as such witness, in any form prescribed by law, (or, *John Smith* was called and sworn as a witness on the part of the said plaintiff, and on his examination as such witness, the said *John Smith* was asked, by the said plaintiff, the pertinent and proper question, "Whether he was acquainted with the hand writing of *Richard Roe*?" to which question the said *John Smith* refused to make any answer.)

And the said *James Jackson* having made oath before me, that the testimony of the said *John Smith* was so far material, that without it he could not safely proceed in the trial of the said cause :

Now, therefore, you, the said Constable, are hereby commanded forthwith to convey and deliver the said *John Smith* into the custody of the said Keeper of the said jail, and you the said Keeper are hereby required to receive the said *John Smith* into your custody in the said jail, and him there safely keep, until he shall submit to be sworn as such witness as aforesaid, and shall be discharged by due course of law, (or, until he shall submit to answer the said question so put to him by the said *James Jackson*, and be discharged in due course of law.) Hereof fail not. Given under my hand, the 30th day of November, 1840.

JOHN B. GILBERT, Justice.

CHAPTER X.

Of Evidence.

SECTION I.

ITS GENERAL NATURE AND IMPORTANCE.

THE most formidable difficulty that will present itself to the justice, as well on the hearing by himself, as the trial before the jury, will be the rules of evidence in the admission or rejection of testimony. This difficulty will discover itself in various shapes, and often in disguised forms. The intrinsic difficulty of the thing renders it next to impossible to lay down abstract rules, that will be a guide in all cases. Indeed, almost every case must stand alone, separated from others that resemble it by some slight shade or difference, unnoticed by superficial observers, but substantially varying from the reason and ground work of its kindred case. Nothing is more likely to mislead a mind unaccustomed to legal investigation, than the resemblance of one case to another, or to some general principle, when at the same time it is substantially different.(a)

Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other ; and no evidence ought to be admitted to any other point.(b)

The first thing therefore, we repeat,(c) which it is the duty of the justice to turn his mind to, is, the issue between the litigant parties ; that is, as we have seen, what they have affirmed on one side and denied on the other.(d) It is important, in the first place, to ascertain on which side the burthen of proof lies ; for, in all issues, one party takes upon himself the proof of the fact in issue. This is most usually with the plaintiff, but not always so.(e)

(a) Penn. on Small Causes, 149.
(b) 3 Blac. Com. 367.
(c) Vid. ante, 877.

(d) Id. 833, 4.
(e) Penning. on Small Causes,
Ante, 893.

SECTION II.

THE GENERAL RULES OF EVIDENCE.

RULE I.

Whichever side hath the affirmative of the question, that side hath also the burthen of proof.

Suppose, in an action of trespass for taking and leading away a horse, the defendant, instead of pleading the general issue and then pleading a justification, as we have seen he would have a right to do, (f) should content himself with pleading directly a justification that the horse was taken under his execution, as ante, 815, 816, and the plaintiff should reply and deny the fact. What then would be the issue? Not the *taking and leading away* of the horse; for this is admitted by the special plea; (g) but *whether the defendant took the horse as he alleges*. Who then affirms this fact? Not the plaintiff: he denies it. It is then the defendant, and on him the burthen of proof lies. And so of any other *special affirmative* plea, denied by the replication. (h) The case put is, to be sure, one which rarely happens, because the defendant usually precedes his special plea with the general issue, in which case, the burthen of proof shifts from one party to another. After the plaintiff has made out his case, the defendant then shows the truth of his plea, or any fact not pleaded, which is admissible under the general issue, in order to defeat the plaintiff's claim; as infancy, payment, insanity, &c. (i) Here the affirmative lies with the defendant. And so, doubtless, where an action is brought for selling spirituous liquor without license, &c. though the declaration must deny the defendant's having license, (j) yet it is sufficient to prove the sale of the liquor, and it then lies with the defendant to show his qualification, by producing and proving his license, &c. and so of the like cases. (k)

And the burthen of proof some times changes sides, according to certain rules of presumption. Thus, on a plea in bar that the defendant is

(f) Ante, 715.

(g) Ante, 719.

(h) Of the burthen of proof in an action for tavern expenses, vid. ante, 245.

(i) Vid. Table of Defences, ante, 600 to 698.

(j) Ante, 608.

(k) Vid. 1 Phil. Ev. 198, 9, and the notes by Cowen & Hill, p. 490, 1.

a married woman, if the plaintiff proves that her husband was gone, and no account heard of him for more than seven years before the promise, the burthen is then thrown on the defendant to show him alive, for the reasons mentioned ante, 708.(l) And so, where the fact lies peculiarly within the party's knowledge, as if the defendant prove himself an infant at the time of the promise, and the plaintiff then proves a subsequent promise, which he alleges was after the infant came of age, the defendant must then show his non-age at the time of the second promise.(m)

The rule that the affirmative must be proved, has also the following exception: Where an action is brought for a culpable omission, or breach of duty, as where a constable is sued for not taking goods and chattels on an execution, &c. or not arresting a man on an execution or warrant, or any other officer for not doing his duty, whereby the party is injured, the negative or omission must be proved; for it is one of the first principles of justice, not to presume that a person has acted illegally, till the contrary be proved.(n)

RULE II.

It is always sufficient to prove the substance of the issue.

Where the plaintiff alleges that the defendant was to do a certain act, on the payment of a sum of money, proof of tender and refusal establishes the issue, for this is equivalent to, and in substance, a payment.(o) And a plea of payment, of a principal sum and all interest due, is established by showing the payment of a gross sum, not amounting to the full interest, but which was accepted as payment of the debt.(p) And where a declaration is in trespass, for cutting down, &c. certain trees, (and by parity, in trespass, or trover for taking, and converting certain goods and chattels,) proof of cutting part of the trees, or taking and converting a part of the goods or chattels mentioned, sustains the issue for so much.(q) In the action of assumpsit, for debt on simple contract, the plaintiff may prove and recover a less sum than he demands by his declaration;(r) and in an action for the escape of husband and wife from execution, for a debt due from the wife before marriage, proof that the husband alone escaped, will be sufficient.(s)

(l) 6 East, 80, 85. 1 Phil. Ev. 197, 8, and the notes by Cowen & Hill, p. 439.

(m) 1 T. R. 648. And see the cases cited 1 Phil. Ev. 198, 9, and the notes by Cowen & Hill, p. 490, 1.

(n) Vid. cases cited, 1 Phil. Ev. 195, 6, and in the notes by Cowen & Hill, pages 296 to 301, 483, 4, et seq.

(o) 1 Wils. 115. But see 5 Monroe, 372.

(p) 2 Str. 690. 5 Cranch, 11. 3 John. 229.

(q) Co. Litt. 282, a.

(r) 1 H. Bl. 249.

(s) 1 Sid. 5.

Averments in a declaration, plea &c., which are wholly impertinent and might be struck out, without affecting the cause of action or defence, need not be proved ; as if I declare on an express warranty of soundness, and state that the defendant knew of the unsoundness, if I prove the warranty and unsoundness as laid, I need not prove the defendant's knowledge, because the express warranty is enough ; and a cause of action would be sufficiently stated and made out in proof, though the averment of knowledge be stricken out of the declaration.(t) And so, where I allege that the defendant *maliciously* dug under my house, and caused its fall, &c. proof that in digging a cellar adjoining me, he *negligently* did the injury complained of, sustains the issue, for the words *maliciously* &c., may be stricken out of the declaration, and yet leave it good.(u) So in an averment, that a note was assigned, *for value received*, the words *for value received* are immaterial, and need not be proved, and the declaration is sustained, though the assignment do not contain these words ;(v) but the averment that the defendant made his promissory note, setting it forth, and adding "*being for value received*," must be sustained by a note containing the words "*for value received* ;" for the averment is a description of the contract.(w)

But in regard to records, writings or contracts, which make a part of the plaintiff's case, they must be proved as laid, although parts of them are stated which are altogether immaterial ; for such records, writings or contracts are entire, and a part only cannot be stricken out, so as to square them with the evidence. The party should, therefore, set out barely so much of these, as will make out his action or defence according to their legal effect, and not *verbatim*, as in the papers, &c. themselves, for fear of a misdescription.(x)

We before noticed the precision with which special contracts must be set forth in pleading, whether they be simple contracts or contracts under seal : and shall content ourselves with referring the reader, for the general doctrine on this subject, to our former pages, 589 to 595. It is always sufficient to state the contract according to its true sense, or legal effect, without adopting its very words, and this, whether it be in writing or by parol, sealed or unsealed.(y) When so stated, however, it must be

(t) 2 East, 446.

(u) 17 John. 92.

(v) 3 Cranch, 193. 1 Call's R. 106.

(w) 10 Johns. 418. And see cases in Cowen & Hill's Notes to Phil. 525.

(x) Doug. 665 to 669, ed. 1807, and notes at the end of case. Vid. also, Cow-

en & Hill's Notes to Phil. Ev. 518 to 531 ; and 2 R. S. 328, § 99, as to disregarding variances. Vid. post, closing remarks on the rule now under consideration.

(y) Ante 592. 10 Mass. Rep. 230. 1 Chitt. on pl. 334, 5, ed. 1833. 1 Barn. & Ald. Rep. 9.

proved as laid, or the plaintiff must fail in his action unless the case be one wherein the court may disregard the variance, pursuant to 2 R. S. 328, § 99, stated post, at the close of remarks on this rule, or, the more liberal rules in favor of amendments now acted upon independently of the statute. The following instances are presented as illustrations of the old and severe rule.

The plaintiff, in setting forth a lease in his declaration, stated the rent to be payable in *quarterly payments*: The evidence was, that no particular time of payment was agreed upon between the parties; it was held that the plaintiff must be nonsuited.^(z) Declaration on a corrupt agreement, under 12 Anne, stat. 2, ch. 16, made on 21st December, 1774, giving day of payment to 23d December, 1776: Proof of contract made 23d December, 1774, and of forbearance for *two years*; this was held a fatal variance.^(a) Declaration on contract by defendant, to deliver *all* his tallow to the plaintiff *at four shillings per stone*:—Proof that defendant should deliver it *at four shillings per stone, and so much more as the plaintiff paid to any other person*: Plaintiff nonsuited.^(b) Declaration, in consideration that plaintiff would buy of defendant forty-five sheep, for 54*l.* 11*s.* 6*d.* the defendant undertook, &c. that they were sound:—Proof, that the price was 54*l.* 12*s.* 6*d.*: Plaintiff nonsuited, though it seems this would not have been the case, had the sum been laid after a *videlicet*.^(c) Declaration, that plaintiff agreed to build two houses for 500*l.* by a certain day, which *he had done*:—Proof, that the time had been enlarged by parol, and the houses finished *within the enlarged time*: Plaintiff nonsuited.^(d) Declaration, that defendant agreed to sell plaintiff 400 *bushels of oats*, &c.; Proof, that defendant agreed to sell plaintiff so many bushels of oats, at the *Hartland Quay measure*: Plaintiff nonsuited: for the word *bushel*, means *Winchester bushel*, unless otherwise expressed.^(e) Declaration, in consideration that the plaintiff would deliver certain pictures to one *Poole*, defendant promised to pay, &c.—Proof, that the promise to pay was in consideration that the pictures should be delivered to the defendant: Plaintiff nonsuited.^(f) Declaration for wages, “during a certain voyage from the port of *London*, to the coast of *Africa*, and from thence to the *West Indies* :”—Proof, that the voyage was “from the port of *London*, upon an intended voyage to the coast of *Africa*, for slaves, from thence to the *West Indies*, or *America*, and after-

(z) Doug. 665.

(a) Cowp. 671.

(b) 1 T. R. 447.

(c) 3 T. R. 67, cited *arguendo*, by Dampier

(d) Id. 390. S. P. 8 John. 392.

(e) 4 T. R. 314.

(f) Id. 687.

wards to *London*, in *Great Britain*, or to her delivery port in *Europe* ;^(g) the variance in the description of the voyage between the declaration and proof was held fatal, though the captain put an end to the voyage in the *West Indies*, and though the description of the voyage in the declaration was laid under a *scilicet*.^(g) Declaration on contract, to deliver forty bags of wheat on one market day, and sixty bags on the then next market day :—Proof of a contract to deliver forty or fifty bags the first day, and the remainder at the next market day ; the variance was held fatal.^(h) Declaration against two defendants on a warranty upon a joint contract of sale :—Proof of a warranty by one of the defendants, upon a contract to sell the article as his *separate* property : Plaintiff nonsuited.⁽ⁱ⁾ Avowry, setting forth a lease upon 110*l.* rent :—Proof of a lease of 148 acres, at 15*s.* per acre, equal to 111*l.* rent ; the variance was held fatal.^(j) Declaration in debt, for rent on a demise, at 15*l.* rent :—Proof of a demise at a rent of 15*l.* and 3 fowls ; variance held fatal.^(k) Declaration, that the defendant was tenant of land in F., in consideration whereof he promised to manage it in an husband-like manner :—Proof, that the land lay in F. and C. : Plaintiff nonsuited.^(l) Declaration on a policy of insurance ; one count avers interest in A., and another count avers interest in B. :—Proof, that the interest is in A. and B. jointly : the plaintiff cannot recover under either count.^(m) Declaration, that the defendants were severally indebted to the plaintiff in divers sums, and accounted with him for the same, being 21*l.* 6*s.*, and in consideration that he would forbear payment of that balance, the defendants jointly undertook to pay the same to him :—Proof, that the balance was, on accounting, 20*l.* 18*s.* ; Plaintiff nonsuited.⁽ⁿ⁾ If a bill drawn by *John Couch*, be declared on as a bill drawn by *John Crouch*, the variance is fatal.^(o) And so, where the defendant is sued on a note given by him and others, and the declaration varies from the note in the name of either of the defendant's co-promissors.^(p) And where a note is made payable at a particular place, it is a fatal variance, if the place be not stated in the declaration.^(q) S. P. 3 Campb. R. 463. And so, if a place be stated in the declaration, but none appear on the bill or note, but only by way of memorandum at the foot thereof.^(r) In an action against a carrier, a contract is alleged to carry goods from A. to B., a

(g) 2 Boss. & Pull. 116.

(h) 2 East, 2.

(i) 12 East, 452.

(j) 4 Taunt. 320.

(k) 2 Doug. 666, cited.

(l) 4 Taunt. 700.

(m) 5 Id. 101.

(n) 3 Maule & Selw. 173.

(o) 3 Bos. and Pull. 559. S. P. 4 Taunt. 810.

(p) 4 T. R. 611.

(q) 3 Campb. R. 247.

(r) 4 Maule & Selw. 506.

variance in evidence as to the *termini*, is fatal.(s) Declaration on contract to pay for *half* the land taken for a certain road, is not sustained by proof of a contract to pay for *all* the land taken therefor; (t) nor is a declaration on a contract to *build* a ship, by evidence of an agreement to *finish* a ship partly built.(u) Declaration on a promissory note, omits to aver that the defendants are partners, or acted under a firm, but states simply that they made the note, &c., *their own proper hands and names being thereunto subscribed*, by the name and description, &c. Proof, that one of the defendants, a partner of the others, signed the name of the firm, will not support the declaration.(v)

In an action *qui tam* for usury, the plaintiff alleged a loan by the defendant to A. for *sixty three days*, and produced a note in evidence, payable to the defendant in *sixty days*, this was held a fatal variance, although the three days of grace, added to the number of days specified in the note, would make sixty three days.(w) In regard to variance between declaration and proof, upon a note payable in specific articles, vide ante 173,4. In an action *qui tam* for taking usury, the declaration stated the taking to have been in pursuance of a loan of \$200, by means of a promissory note; and the evidence was of a loan of \$200, *and the interest thereon for more than six months*; this was held a fatal variance.(x) For various other illustrations in like actions, see the notes of Cowen & Hill, to Phil. Ev. p. 515, 533. Evidence of a promise to deliver certificates of debenture, will not support an action on a promise to pay money.(y)

The law requires the same and even greater strictness in a *plea* of usury, than in a *declaration* in an action *qui tam*, under the statute of usury.(z)

We before noticed, that in setting forth a written contract it is not necessary to describe the parties as of such a place, or degree, though they be so described in the contract.(a) This omission will therefore be held no variance. Accordingly, in *Evans v. Smith*, 1 Wash. Rep. 72, an objection was taken at the trial, to the giving of the bond in evidence, on account of a variance between it and the declaration, in this, that the defendant is, in the bond, said to be "of the county of Essex," which is omitted in the declaration. The objection was overruled, and on appeal

(s) 2 Stark. R. 385. 21 Wend. 153. (w) 4 Day, 114.
 1 Brod. & Bing. 538. (x) Id. 37.
 (t) 8 John. 253. (y) 7 Mass. Rep. 325.
 (u) 3 Day, 312. (z) 10 John. 140, and vide 3 T. R.
 (v) 7 John. 463. Cowen & Hill's 531. 8 John. 84.
 Notes to Phil. Ev. 515, 533. But vid. (a) Ante, 605.
 Camb. R. 305.

the judgment was affirmed. So, in the same book, p. 199, the plaintiff declared, that he rented certain ground to the defendant, for the use of the *Jockey Club*, &c. In the agreement produced in evidence, the defendant was styled *treasurer of the Jockey Club*, but the variance was held immaterial. So, where a bond was payable to *James Whitlow, jun.* and the declaration described it as payable to the *plaintiff*, after naming him as *James Whitlow, Jun. alias James Whitlock*, this was held not a material variance.(b)

Where the contract declared upon was, that plaintiff had bargained and sold, and defendant agreed to buy a large quantity of head matter and sperm oil, which was afterwards ascertained to be a given quantity, and the contract proved was, for the purchase of all the head matter and sperm oil, *per the Wildman*: held, that this was no variance.(c)

The place stated, either in the declaration or plea, in a justice's court, will scarcely ever be material, and consequently need not be proved. If, however, it be a part of a special contract, as in some of the cases cited ante, 919 to 921; or where, in trespass on lands, or assumpsit for use and occupation, the plaintiff states a particular town, which seems to be necessary in trespass, though not in the action for use and occupation, the place must be proved as laid.(d) For other illustrations see Cowen & Hill's notes to Phil. Ev. 536 to 538.

The time stated in the declaration is also, in general, wholly immaterial, unless it make a part of the contract or writing set forth, and is used as matter of description in the pleading.(e) It has been determined, that the time of a penal offence, alleged in a declaration, is wholly immaterial, as in an action for selling liquor without license, &c.(f) The time of committing an alleged trespass is seldom material. Cowen & Hill's Notes to Phil. Ev. 535. Where a trespass is alleged to have been committed on "divers days and times" between two given periods, the plaintiff may give evidence of any acts of trespass between the periods mentioned; but after having given such evidence he cannot go for a trespass committed at another time. He may, however, at the commencement of the trial, elect to waive his right to prove a trespass between the alleged periods; in which case he will be allowed to go for any other single act of trespass within the time prescribed by the statute of limitations. But he must rest on that, and cannot prove more than one; for the declaration is then regarded as containing but one count. 16 Mass.

(b) 2 Munf. 510.

(c) 1 Barn. & Ald. 9, and vid. 13 East, 410.

(d) 3 Camp. R. 235.

(e) 2 Johns. 8. And see Cowen &

Hill's Notes to Phil. Ev. 538 to 536.

(f) 13 Johns. 253.

R. 470. Cowen & Hill's Notes to Phil. Ev. 535. Perhaps, however, tying the party up by such election, is but matter of practice or discretion.

Where the declaration is general, for goods, &c. sold, work, &c. done, moneys, &c. and all the cases in which a general form of declaring is good, (g) you may content yourself with proving only a part of your declaration or count, either in kind, quantity or value. (h)

For such matters as are presumed, or implied by law, and therefore, do not call for strict proof, vide ante, 621, 2.

The rule that the proof must substantially correspond with the cause of action or defence stated, was extended to a justice's court, by an express adjudication of the supreme court, on certiorari. (i) But unless the objection for variance be taken on the trial, it cannot be made available afterward. 17 Wend. 71.

In an action to recover the penalty given by the 7th section of the act to lay a duty on strong liquors, sess. 24, ch. 164, it was held, that the plaintiff might unite in his declaration, any number of offences, and prove what number he pleased; but that he could only recover the penalty for a single offence. (j)

The foregoing summary is deemed sufficient to exhibit the general doctrine of variance, where no statute or rule intervenes to modify its rigor. The reader desiring a more extended view of the cases is referred to the notes to Phil. Ev. by Cowen & Hill, where a somewhat full collection will be found. Vid. Cowen & Hill's Notes to Phil. Ev. Index, title "*Variance*."

In order to obviate, in some degree, the inconvenience and injustice too often arising from an application of this doctrine to cases of mere technical variance, not at all affecting the merits, the following statute provision was introduced into the revision of 1830: "Every variance between process, pleadings, or any instrument in writing, recited or referred to in any other process, pleading or record, and every mistake in the name of any officer or other person, in stating any day, month, or year, or in the description of any property, in any pleadings or record, which, according to law, could be amended by the court after verdict rendered in any cause, shall be disregarded upon the trial of such cause, unless such variance or mistake be calculated to surprise and mislead the adverse party, and to prevent his making due preparation for a full an-

(g) Vide ante, 632 to 637.

(h) 1 H. Bl. 249. Bull. N. P. 129.

(i) 1 Caines, 593.

(j) 13 John. 253. 7 John. 184.

swer on the merits, to the matter concerning which, such variance or mistake shall have been made." 2 R. S. 328, § 99.

The variances contemplated by the statute are those where, in the declaration or pleading, *a written instrument* of any kind has been erroneously recited or referred to, or where a mistake has occurred in the *name of any officer or other person*, or in stating any *day, month or year*, or in the *description of any property*. Vid. Cowen & Hill's Notes to Phil. Ev. 531. This species of variance or mistake, instead of operating as formerly to exclude a defence, or turn a plaintiff round to a new action, may now, under certain limitations, be disregarded on the trial. But, in order to authorize that course, the variance or mistake must be clerical or unimportant, and the court is to be satisfied that the party objecting has not been surprised and misled by it, or prevented from making due preparation for a full answer on the merits. Vid. 15 Wend. 672, 3. 17 id. 113. 19 id. 542, 3. Whether he is likely to have been so surprised or misled, &c. is a question for the court in the exercise of a sound discretion. 15 Wend. 672, 3. Under the like qualifications, independently of the statute, amendments may now doubtless be made at the trial, of most variances between pleadings and proofs, where the action is founded on an oral contract or wrong. 19 Wend. 542. Several of the cases cited in Cowen & Hill's Notes to Phil. Ev. 531, 2, present instances of both kinds. The course of the supreme court, it is true, generally requires that a motion to amend should, in such cases, be made to the bench, the original pleadings being there; not at the circuit. Id. 532. The justice's court, however, combines the powers of both.

RULE III.

The best evidence is to be produced, which the nature of the case admits.

This is pronounced by Chief Justice Pennington, to be the great leading rule on the head of evidence, which, like Aaron's rod, swallows up all others.^(k) It is certainly a very important rule; and is perhaps to be oftener applied in practice by our courts of justice, than any other. But it is by no means a difficult one, though for want of understanding or practicing it, many causes fail, and many defences are defeated.

This rule relates, principally, to *written evidence* and *subscribing witnesses*.

1. Wherever a writing is a necessary part of the evidence, in establishing the action or defence, it must be produced. Thus, a writ,^(l) or

(k) Penning. on Small Causes, 149.

(l) 6 John. 19.

a bond, lease, or other specialty under seal, or a bill of exchange, promissory note, or any other written instrument, must be produced before any evidence can be given of its contents.(m)

2. If there be subscribing witnesses to such writing, they alone are competent to prove it, and at least one of them must be produced on the trial.(n)

But both these rules are subject to various exceptions.

Exception 1st.

If the writing be of a public nature, as if it be a state record, on file with the secretary of state, a record of chancery, of the supreme court, or court of common pleas: In all these cases, though the writing be directly in issue upon a plea of *nul tiel record*, (o) or otherwise, a copy exemplified, or certified in the mode pointed out by 2 R. S. 324, § 72, by the officer having the custody, under his official seal, is sufficient, as well as the record itself. One or the other of these must, it seems, be produced, when the record is directly in issue, which, in general, is only on the plea of *nul tiel record*, which is triable by the record only.(p) When the record is only inducement, or, in other words, not directly denied by the pleadings, it may be proved as in the following exception:

Exception 2d.

In cases where the record is not directly in issue, but the action or defence is grounded upon some other matter, and the record is mere inducement, but yet a necessary link in the chain of testimony, or comes collaterally or incidentally in question, there, either exemplified or sworn copies, made and compared as hereinafter mentioned, are admissible in evidence.(q)

Exception 3d.

A rule of court, under the hand of the proper officer, as the register or assistant register in chancery, or clerk of the supreme court or common pleas, is itself an original and good evidence of itself, upon its mere production, without further proof, the same as an exemplification.(r) This is called an *office copy*. Copies of affidavits served on the opposite party, upon which to ground a motion, have also been held equivalent

(m) Vide 12 John. 221.

(n) 1 Phil. Ev. 464, 496. Cowen & Hill's Notes to Phil. Ev. 1261 to 1263, 1849.

(o) Vide ante, 695.

(p) But see 6 Wend. 512.

(q) And vid. ante, 204. Bull N. P. 228.

(r) 1 Ld. Raym. 745. 11 John. 434.

to office copies, and as such, are admissible in evidence.(s) A verdict alone, without the judgment founded upon it, is not evidence,(t) unless it be a verdict on an issue out of chancery, in which case, showing the decree thereupon, will be enough.(u) But a verdict in a justice's court is evidence, without the judgment; for a justice cannot, like a court of record, either arrest a judgment, or grant a new trial, but is bound to render judgment thereon; and should he omit to do this, the law will, itself, attach the proper judgment to the verdict.(v)

Exception 4th.

A proceeding in a cause before a justice of the peace, though it is so far a record, that it cannot be proved by parol, 5 John. 351, 11 id. 166, yet it is proveable either by the production of the docket of the judgment, verified by the oath of the justice,(w) or, if it be the declaration, plea, process or other paper in the course of the cause, by its production, verified in the same way;(1) or a sworn copy of the docket or other paper is equally evidence.(2) And, indeed, these may all, or any of them, be proved by parol, if this mode of proof be not objected to.(3)

But the most usual way of proving proceedings in a justice's court, is, by the justice's official certificate, authenticated according to 2 R. S. 196, § 245 to 247. As proof before himself, the original docket or a certified copy by himself, is sufficient. § 245. Before any other court, it is not, unless also authenticated by the county clerk, as required by § 247. The form is a simple transcript (literal copy,) of the justice's docket, to the extent required by § 246; and the contents of his docket are prescribed in the previous section, 243. A copy for use before himself is to be certified, § 245. When to be used elsewhere, it is simply to be subscribed by him, thus: "A copy. *Ransom Cook*, Justice of the Peace." The clerk's certificate describes his official character in terms more full. § 247. The transcript thus authenticated is evidence in all courts, and may be used in favor of the justice, as well as others, and this though it be made out after he has ceased to be in office. But it seems the transcript cannot be received as evidence of any proceeding, if there be no judgment. Otherwise, as to the docket or certificate to be used before the justice himself. The transcript cannot of course be received as evi-

(s) 11 John. 434.

(t) Bull. N. P. 234. Willes, 367.

(u) Bull N. P. 234.

(v) 2 John. 181. Ante, 726.

(w) 11 John. 166. 2 R. S. 196, § 243.

(1) 3 John. 429. 2 R. S. 196, 7, § 248.

(2) Id. id.

(3) 12 John. 296.

dence of any matters which the justice is not authorized to enter on his docket, pursuant to § 243 and § 244. The first, points out specific items of entry. The last section refers the extent of the docket and consequent evidence derivable from it, in some measure to his discretion, so long as it is confined to matter which properly belongs to the cause pending before him. The certifying clerk must belong to the same county with the justice.(x)

The justice may doubtless state in his docket the matters which were actually tried before him, and what was submitted to or withdrawn from the consideration of the court or jury, where he shall deem either to be material. His transcript then exhibits these facts. So items of evidence may sometimes also become a material subject of entry, and be shown in the same manner.(y)

The directions contained in the statute must be strictly followed in the frame and mode of authenticating this kind of evidence, or it will be inadmissible.

If the certificate or transcript omit to state what evidence was given on the former trial, or what was submitted or withdrawn from the consideration of the court or the jury, this may be proved by parol evidence on the oath of the justice, of counsel, or a bystander, &c. This is the rule even in a court of record.(z) And the minutes of evidence made by a magistrate, or other person upon a trial, are no higher in degree than their verbal evidence; and, therefore, need not be produced, though they may be resorted to, in order to refresh the memory of the witness, like all other memoranda made at the time of a transaction. If the minutes be original entries made at the time, they may, on this being proved by the person who made them, be themselves received as proof, though the witness may have forgotten the facts.(a)

FORM OF THE CLERK'S CERTIFICATE OF AUTHENTICATION.

SARATOGA COUNTY, ss. I, Archibald Smith, clerk of the said county, do certify, that *Ransom Cook*, the person subscribing the within [or *annexed*] transcript, was, at the date of the judgment therein mentioned, viz. on the 10th day of September, 1840, a justice of the peace of the

(x) Vid. Cowen & Hill's Notes to Phil. 1107 to 1109. 15 Wen. 237, 239. 8 id. 393, 4, 5. 5 id. 292. 1 Cowen, 115, 116. 6 id. 261. 2 Pick. 436. Ante, 725.

(y) Vid. 13 John. R. 184.

(z) 16 John. 186. 2 id. 227, and vid.

ante. 724. Also, Cowen & Hill's Notes to Phil. 837 to 840, 952, 971, 2, and cases there cited.

(a) 1 Phil. Ev. 221, and Notes by Cowen & Hill, pp. 550, 750 to 759, 579 to 585.

said county. In witness whereof, I have caused the seal of the court of common pleas of the said county to be hereunto affixed, this 12th day of September, A. D. 1840.

[L. s.]

ARCHIBALD SMITH.

This transcript of the justice, properly authenticated, is, like a record, conclusive evidence, and cannot be contradicted by parol testimony.(b)

Exception 5th.

The right of proving papers by a sworn copy is, by no means, confined to the cases mentioned ante, 925, 2d exception. Wherever the writing to be proved is of a public nature, and therefore properly confined to a single place, for the inspection of all whom it may concern, a sworn copy is good evidence. Thus, not only the records, books, and other papers properly and officially on file, or belonging to the various offices of state, and of our courts of justice, are susceptible of proof in this manner; but a great variety of others of inferior importance or authority, as those in official custody of the clerk of the board of supervisors, town clerks, school district clerks, and the proper officers of other municipal corporations.(c) It is doubtless within the same principle, that the sworn copy of a justice's docket is evidence.(d) It is necessary that these sworn copies should be received in evidence, as well for the security of the instrument as for the convenience of the public.(e) Though it has been denied that the rule extends to the papers of a private corporation; as a bank, insurance company, turnpike company, church, library and the like.(f)

Certified copies by town clerks and other officers having the custody of papers belonging to municipal corporations, are made, by the revised statutes, a very common medium of proof.(g)

FORM OF A TOWN CLERK'S CERTIFICATE.

SARATOGA COUNTY, and Town of Saratoga Springs, ss. I certify that the above is a copy of an instrument in writing, duly filed in the office of the town clerk of the said town.

GEORGE C. LOOMIS, Clerk of said Town.

(b) 13 John. 184.

(c) 1 Phil. Ev. 424, and notes 1165, 6.

(d) Ante, 926.

(e) 1 Phil. Ev. 424.

(f) Id. Notes 1157, 1165.

(g) 1 R. S. 343, § 16, and 2 id. Index Evidence.

When the production of the original, or the copy of any paper is necessary as proof, even the confession of the party against whom it is intended to be used, unless made in court, will not dispense with the necessity of the regular proof.(h)

Sworn copies are to be proved like other transcripts, by a witness who has himself made the copy, or compared it line for line with the original, or who has examined the copy, while another person read the original.(i) He can generally determine whether the original paper be the true one by the place where, the person with whom, or the book in which, he finds it, and is to state the mode in which he examined it, under oath in court, the same as if he were brought to prove any other fact, being equally subject to cross-examination. On the court being satisfied that the copy is a true one, it is received in evidence, if pertinent to the matter in issue. But no copy of a copy, examined as above, however authenticated, is admissible, provided the original be still in existence.(j) Otherwise if that be lost, and the copy be therefore resorted to as secondary evidence.(k)

Exception 6th.

The rule that the instrument itself must be produced, does not extend to mere written acknowledgments of facts, memoranda or notices. Thus, though a receipt be given, payment may be proved in any other way: and so, though a memorandum be made by a witness, if he can remember the same facts without a memorandum, he is not bound to produce

The following is the form of a certificate as required by the Revised Statutes, (2 R. S. 324, § 72, new Ed.) for a town clerk, instead of the one given at p. 928.

"*Saratoga County and Town of Saratoga Springs, ss.*—I have compared the above with the original on file in my office, and the same is a correct transcript therefrom, and of the whole of said original.

GEORGE C. LOOMIS,

Clerk of said Town."

(h) 6 John. 9. 10 id. 248.

(i) 1 Phil. Ev. 386. Notes by Cowen & Hill, 1065, 1240.

(j) Cowen & Hill's Notes to Phil. Ev. 1065, 6.

(k) Id. and id. 1234, 1240.

(l) Id. 547, 550, 750.

(m) Id. ut supra, 700.

(n) Id. ut supra, 1198, 9.

(o) Id. ut supra, 547.

the instrument.(p) But the law goes no farther, and it is not necessary to produce the supposed writer or signer of a contract, or other instrument, in order to prove or disprove its execution. This may be done by proof of the hand-writing, through third persons, where there are no subscribing witnesses. Thus, you may prove the hand-writing of a justice, to show that he issued process; or a constable, &c. to show his return; and so in a great variety of cases.(q)

To this branch of the rule, there are, also, the following exceptions :

Exception 1st.

All conveyances or writings concerning real estate proved, or proved and recorded, pursuant to 1 R. S. 745, ch. 3, and the previous statutes on the same subject; and every other written instrument, proved pursuant to 2 R. S. 325, § 74, are evidence of themselves. As to writings concerning real estate, when recorded, the record or a duly certified transcript is also evidence. 1 R. S. 749, § 17. Either original or copy is, however, but presumptive evidence of the execution of the instrument; and may be rebutted. *Id. id.* Justices of the peace may, in their own counties, take the proof. Sess. Laws of 1840, ch. 238, p. 187. So county judges, mayors, recorders, and the chancellor and judges of the supreme court and circuit judges any where in the state; and out of the state, judges of any United States court, or supreme, superior or circuit court, the mayor of Philadelphia or Baltimore, judges of the highest courts in either of the Canadas, a United States consul, minister or *charge des affaires* in Europe or South America, the mayor of London, mayor or chief magistrate of Dublin or Liverpool, the provost or chief magistrate of Edinburgh. 1 R. S. 746, 747, § 1 to 6. Special commissioners are also sometimes appointed to take proof abroad. The proof is either by acknowledgment of the party who executed the instrument made personally to the officer, or it is by a subscribing witness. *Id.* 746, § 4, and 746, § 12. In either case, a certificate of the proof must be endorsed, in the form required by the statute. *Id.* 746, § 15. Last wills and testaments, promissory notes and bills of exchange are excepted by the statutes, and cannot be proved in the above form. *Id.* 752, § 39. 2 R. S. 325, § 74. It is presumed that the exception means such promissory notes as are within the statute; not such as are payable in specific articles, or on condition, &c. *Vid. ante*, 160.

(p) 1 Phil. Ev. 464, 5, et seq. Cowen (q) *Id.* 223, and Notes, 553.
& Hill's Notes, 1261, 2.

**FORMS OF CERTIFICATE OF PROBATE OF DEEDS AND OTHER INSTRUMENTS
BY ACKNOWLEDGMENT, BEFORE A JUSTICE OF THE PEACE.**

Vid. 1 R. S. 746, § 4. Id. 748, § 9 to 15.

By the acknowledgment of a person known to the justice.

SARATOGA COUNTY, ss. On the — day of —, in the year —, *John Doe*, whom I know to be the individual described in and who executed the within conveyance, (or, *instrument*;) (1) personally came before me and acknowledged that he executed the same.

—, *Justice of the Peace.*

By the acknowledgment of a person unknown to the justice, but who is identified by a witness.

SARATOGA COUNTY, ss. On the — day of —, in the year — *John Doe*, personally came before me and acknowledged that he executed the within conveyance, (or, *instrument*;) and at the same time *Richard Roe*, residing in the town of —, in said county, to me well known, came before me, and being by me duly sworn, said that he knew the person making the said acknowledgement to be the individual described in, and who executed the said conveyance, (or, *instrument*;) which to me is satisfactory evidence thereof.

—, *Justice of the Peace.*

By the acknowledgment of husband and wife, known to the justice.

SARATOGA COUNTY, ss. On the — day of —, in the year —, *John Doe*, and *Mary* his wife, whom I know to be the individuals described in, and who executed the within conveyance, (or, *instrument*;) personally came before me and severally acknowledged that they executed the same. The said *Mary*, on a private examination by and before me, apart from her husband, acknowledged that she executed the said conveyance, (or, *instrument*;) freely, and without any fear or compulsion of her husband.

—, *Justice of the Peace.*

By the acknowledgment of husband and wife—both unknown to the justice, but who are identified by a witness.

SARATOGA COUNTY, ss. On the — day of —, in the year —, *John Doe*, and *Mary* his wife, personally came before me, and severally

(1) If the writing proved, be not a conveyance of land, it ought to be designated in the certificate, as an "instrument," instead of a conveyance.

acknowledged that they executed the within conveyance, (or, *instrument*;) and the said *Mary*, on a private examination by and before me, apart from her husband, acknowledged that she executed the same freely, and without any fear or compulsion of her husband. At the same time *Richard Roe*, residing in the town of —, in said county, to me well known, came before me, who being by me duly sworn, said that he knew the persons making the said acknowledgments to be the same individuals described in, and who executed the within conveyance, (or, *instrument*;) which to me is satisfactory evidence thereof.

—, Justice of the Peace.

By the acknowledgment of husband and wife—husband known to the justice—wife unknown, and identified by a witness.

SARATOGA COUNTY, ss. On the — day of —, in the year —, *John Doe*, and *Mary* his wife, personally came before me and severally acknowledged that they executed the within conveyance, (or, *instrument*;) I know the said *John Doe* to be one of the individuals described in, and who executed the same. The said *Mary*, on a private examination, by and before me, apart from her husband, acknowledged that she executed the said conveyance, (or, *instrument*;) freely, and without any fear or compulsion of her husband. At the same time, *Richard Roe*, residing in the town of —, in said county, to me well known, came before me, and being by me duly sworn, said, that he knew the said *Mary*, who made the said acknowledgment, to be the same individual described in, and who executed the within conveyance, (or, *instrument*;) which is to me satisfactory evidence thereof.

—, Justice of the Peace.

By the acknowledgment of four persons—two known, and two identified.

SARATOGA COUNTY, ss. On the — day of —, in the year —, *John Doe*, *Richard Roe*, *John Styles* and *Thomas Noakes*, personally came before me, and severally acknowledged that they executed the within conveyance, (or, *instrument*;) At the same time, *John Smith*, residing in the town of —, in said county, to me well known, came before me, and being by me duly sworn, said that he knew *John Doe* and *Richard Roe*, two of the persons making the said acknowledgment, to be two of the individuals described in and who executed the within conveyance, (or, *instrument*;) which is to me satisfactory evidence thereof. I know *John Styles* and *Thomas Noakes*, the other two persons making the said acknowledgment, to be the other two persons described in, and who executed the said conveyance, (or, *instrument*;) which is to me satisfactory evidence thereof.

—, Justice of the Peace.

By the acknowledgment of a person conveying by virtue of a power of attorney.

SARATOGA COUNTY, ss. On the — day of —, in the year —, John Styles personally came before me, and acknowledged that he executed the within conveyance, (or, *instrument*,) as the act and deed of John Doe, therein described, by virtue of a power of attorney duly executed by the said John Doe, bearing date the — day of —, in the year —, recorded in the office of the clerk of the county of Saratoga. I know the said John Styles, who made the said acknowledgment, to be the same individual who executed the within conveyance, (or, *instrument*.) (Or, *if the person is unknown to the justice, and is identified, then say:*) At the same time, Richard Roe, residing in the town of —, in said county, to me well known, came before me, and being by me duly sworn, said that he knew the person who made the said acknowledgment, to be the same individual who executed the within conveyance, (or *instrument*,) which is to me satisfactory evidence thereof.

———, *Justice of the Peace.*

By the acknowledgment of a deputy sheriff, of a deed executed by him, in the name of the sheriff.

SARATOGA COUNTY, ss. On the — day of —, in the year —, George C. Loomis, whom I know to be the individual described in, and who executed the within conveyance, personally came before me, and acknowledged that he, as a general deputy of Samuel Freeman, Esq. the sheriff of the said county, executed the within conveyance in the name, and as the act and deed of the said sheriff.

———, *Justice of the Peace.*

FORMS OF CERTIFICATES OF PROBATE OF DEEDS AND OTHER INSTRUMENTS, BY A SUBSCRIBING WITNESS, BEFORE A JUSTICE OF THE PEACE.

By a subscribing witness, known to the justice.

SARATOGA COUNTY, ss. On the — day of —, in the year —, John Smith, with whom I am personally acquainted, came before me, and being by me duly sworn, said that he was a resident of the town of —, in said county, that he saw John Doe execute the within conveyance, (or, *instrument*,) that he, the said John Smith, subscribed his name thereto as a witness, and that he knew the said John Doe to be the person described in, and who executed the said conveyance, (or, *instrument*.)

———, *Justice of the Peace.*

By a subscribing witness unknown to the justice, but identified by another witness.

SARATOGA COUNTY, ss. On the — day of —, in the year —, *John Smith* came before me, and being by me duly sworn, said that he resided in the town of —, in the said county, that he saw *John Doe* execute the within conveyance, (or, *instrument*,) that he, the said *John Smith*, subscribed his name thereto as a witness, and that he knew the said *John Doe* to be the person described in, and who executed the said conveyance, (or, *instrument*.) At the same time, *Richard Roe*, residing in the town of —, in said county, with whom I am personally acquainted, came before me, and being by me duly sworn, said that he knew the said *John Smith* to be the same person who was the subscribing witness to the within conveyance, (or, *instrument*,) which is to me satisfactory evidence thereof.

———, *Justice of the Peace.*

By a subscribing witness, as to the identity of the husband, and acknowledgment by the wife—wife and subscribing witness both known to the justice.

SARATOGA COUNTY, ss. On the — day of —, in the year —, *Richard Roe*, with whom I am personally acquainted, came before me, and being by me duly sworn, said that he resided in the town of —, in the said county, that he saw *John Doe* execute the within conveyance, (or, *instrument*,) that he subscribed his name thereto as a witness, that he knew the said *John Doe* to be one of the individuals described in, and who executed the within conveyance, (or, *instrument*.) At the same time, *Mary Doe*, the wife of the said *John Doe*, whom I know to be the same individual described in, and who executed the said conveyance, (or, *instrument*,) came before me, and on a private examination, apart from her husband, acknowledged that she executed the within conveyance, (or, *instrument*,) freely and without any fear or compulsion of her husband.

———, *Justice of the Peace.*

By a subscribing witness as to the identity of the husband and acknowledgment by the wife—wife and subscribing witness unknown to the justice, but identified by another witness.

SARATOGA COUNTY, ss. On the — day of — in the year —, *Richard Roe*, came before me, and being by me duly sworn, said that he resided in the town of —, in the said county, that he saw *John Doe*

execute the within conveyance (or, *instrument*,) that he subscribed his name thereto as a witness, and that he knew the said *John Doe* to be the person described in, and who executed the said conveyance (or, *instrument*,) At the same time, *Mary Doe*, the wife of the said *John Doe*, came before me, and on a private examination, apart from her husband, acknowledged that she executed the within conveyance (or, *instrument*,) freely, and without any fear or compulsion of her husband. At the same time, *John Smith*, residing in the town of —, in the said county, with whom I am personally acquainted, came before me, and being by me duly sworn, said that he knew the said *Richard Roe* to be the same person who was a subscribing witness to the within conveyance (or, *instrument*,) and that he also knew the said *Mary Doe*, who made the said acknowledgment, to be the individual described in, and who executed the within conveyance (or, *instrument*,) which to me is satisfactory evidence thereof.

—————, *Justice of the Peace.*

The above forms will serve a double purpose of informing the justice as to the mode of proof required by the statute in order to the admission of conveyances, &c. in evidence; and at the same time furnish him with the precedents necessary in most cases to be used in discharging the duties imposed upon him by the act of 1840, above referred to.

When the proof is taken before a county officer, e. g. a justice, or county judge not a counsellor at law, it must, to be admissible as evidence or recordable in another county, be also authenticated by a certificate of a county clerk as required by 1 R. S. 749, § 18.

FORM OF COUNTY CLERK'S CERTIFICATE.

SARATOGA COUNTY, }
Clerk's Office. } ss.

I certify that — —, whose name is signed to the subjoined certificate of proof, (or, *acknowledgment*,) was at the time when the same purports to have been taken, a justice of the peace of the said county and duly authorized to take the same. And I further certify that I am well acquainted with the hand-writing of the said — —, such justice as aforesaid, and verily believe that the signature to the said certificate of proof (or, *acknowledgment*) is genuine.

In witness whereof, I have hereunto set my hand and
[L. s.] affixed the official seal of the clerk of the said county,
the — day of — in the year —.

ARCHIBALD SMITH,

Clerk of Saratoga County.

An acknowledgment, or proof, before a man who styles himself a *judge, commissioner, or other officer* having authority to take such proof or acknowledgment, is, *prima facie*, evidence that he was such; and it is not necessary for a person who offers a writing so acknowledged, to produce the commission of the officer who took the proof or acknowledgment, or to give any further evidence to prove his authority, until some evidence is given on the other side to render that fact questionable.(r)

Exception 2d.

If a party has admitted the execution of a written contract, not under seal, this dispenses with the production of the subscribing witness,(s) though it is otherwise of a sealed contract;(t) and, in the first case, the admission ought to be direct and explicit; for where A. demanded payment of a note of the defendant, but did not show it, nor state the amount nor date, and the defendant said he had given a note to H. which he would pay at a future day, this was held insufficient to dispense with the production of the subscribing witness.(u) The exception is peculiar to this state; and even here, it has been doubted whether it extends beyond negotiable paper.(v) It is difficult to maintain it on principle; and the authorities elsewhere demand the subscribing witness, notwithstanding the party's acknowledgment, whether the instrument be sealed or unsealed.(w)

AN EXCEPTION to both branches of the rule, is, where the best evidence is out of the party's power.

If the subscribing witnesses are all incapable of being examined, the course then is, to prove their hand writing, or the hand writing of one of them, which latter is enough. This course may be taken, where the subscribing witnesses are dead, or blind, or insane, or infamous, or where they have become interested after subscribing, or where they are out of the jurisdiction of the court, so as not to be the subjects of a subpoena.(x) And so, in relation to a justice's court, if the subscribing witness be neither in the county where the cause is tried, nor in the adjoining coun-

(r) Vid. on the subject of this exception more at large, Cowen & Hill's Notes to Phil. Ev. 1262 to 1268.

(s) 2 John. 451. 3 John. 477.

(t) 3 John. 477. 16 id. 201.

(u) Vid. Cowen & Hill's Notes to Phil. Ev. 1263, 1265. 16 John. 201.

(v) Vid. Cowen & Hill's Notes to Phil. Ev. 1263, 1265; also text of 1 Phil. Ev. 465.

(w) 1 Phil. Ev. 473, 4, and Cowen & Hill's Notes, 1263, 1265.

(x) 12 John. 188, and Cowen & Hill's Notes to Phil. Ev. 1293 to 1299.

ty, this lets in inferior proof.(y) And so in all cases where the witness cannot be found after strict and diligent inquiry.(z)

The subscribing witness' blindness has recently been denied at nisi prius, by Lord Abinger, to be an excuse for not calling him. *Crank v. Frith*, 2 Mood. & Rob. 262, A. D. 1839. He said the witness might, notwithstanding his blindness, on recollection, give material evidence relating to the transaction; and he did not agree with the principle of the text writer, (Starkie,) nor assent to the authority of the cases which allowed secondary evidence by reason of blindness. This was disagreeing with many text writers, considerable authority, and one in the same reporter. *Pedler v. Paige*, 1 Mood. & Rob. 258, before Park, J. in 1833. The latter was staggered by the strong reason for requiring the witness to be called; but received him on positive authority. It is truly difficult to see how mere blindness should, on principle, dispense with the calling of the witness. All agree that the reason for requiring the testimony of a subscribing witness, as primary in degree, is, that he may be able to state the time of the execution, and some circumstances of the transaction which may be material and unknown to other persons. 1 Phil. Ev. 464, 465, Cowen & Hill's ed. Temporary illness is not an excuse; but the course is, in such case, to put off the trial;(a) though it has been said that perhaps some instances of sickness might be an excuse.(b) When a justice has exhausted his power of adjournment, and a witness is absent through sickness, even though it be temporary, that might form an excuse. It is held in this state, that, after the witness' attendance is excused, the next best evidence is proof of his hand-writing; and if you excuse the proof of that, then next, the party's hand-writing, or other facts touching the execution. Other courts have acted on the same distinction;(c) and it seems to prevail in England.(d) This, however, cannot of course be required when the witness denies the attestation, or any knowledge of the execution, or where the name of a fictitious person, or a person without the knowledge or consent of the parties, is inserted; or, if after diligent effort, the witness can neither be produced, nor his hand-writing proved. In these, and like cases, you prove the instrument just as if there were no attesting witness.(e)

(y) 1 Phil. Ev. 473. 12 John. 188, and Cowen & Hill's Notes to Phil. Ev. 1294.

(z) 1 Phil. Ev. 473, and Cowen & Hill's Notes, 1294.

(a) 1 Phil. Ev. 473, 464, and Cowen & Hill's notes, 1299. 1 Stark. Ev. Am. ed. of 1837, p. 327.

(b) 4 Taunt. 47, per Mansfield, Ch. J.

(c) Vid. Cowen & Hill's Notes to Phil. Ev. 1305, 6.

(d) 1 Phil. Ev. 475.

(e) Id. 475, 6. Cowen & Hill's Notes, 1305, 6.

In like manner, if the instrument wanted in evidence be out of the power of the party, as if it be lost or destroyed without his wilful default, or out of the reach of a *subpœna duces tecum*, or in the hands of the opposite party, upon proving either of these facts, a sworn copy or parol evidence is admissible. (f)

If the opposite party have the paper, you must, before entitled to your inferior evidence, give him reasonable notice, either written or oral, to produce it upon the trial, unless it appear that he has it in court; for then to require previous notice would be idle. (g)

FORM OF NOTICE IN WRITING TO PRODUCE PAPER.

JUSTICE'S COURT.

James Jackson }
v.
Richard Roe. }

SIR—You are required to produce in evidence, on the trial of this cause, a certain execution issued by P. G., Esq. a justice of the peace, in my favor, against *Ira Fenn*, and all other papers in your custody or power, relating to the matter in controversy in this cause, or inferior evidence will be given of their contents. Dated September 9th, 1840.

JAMES JACKSON.

To the above defendant.

The mere general clause of this notice has been held insufficient. The paper should be pointed out in some way to the understanding of the party. A notice requiring him to produce a letter written by the plaintiff to W., produced on the former trial, and also adding the general clause, would be sufficient, if the party addressed had so produced the letter. (h) So if a paper, purporting to be a copy of the one to be produced, be annexed to the notice, though it materially differ from the original, in some respects, if it appear that the notice would not mislead. The great object is, to draw the party's attention to the paper by some circumstance or description probably intelligible to him. In an action for services as a singer, notice by the plaintiff to the defendant to produce all letters, papers, &c. and memorandums, and all other documents written by the plaintiff to the defendant or the defendant to the plaintiff, or otherwise, was held a sufficient description of a memorandum stating

(f) 1 Phil. Ev. 489, 451, 2, and Cowen & Hill's Notes, 1214, 1215.

(g) 1 Phil. Ev. 499. Cowen & Hill's Notes, 1186.

(h) 11 Wen. 65.

the terms of the engagement, signed by the defendant and delivered to a witness, and re-delivered to the defendant. A paper may be described by its subject matter, without reference to its date. Thus, in an action to recover moneys under an award of commissioners, a notice to the party to produce all letters, papers and books in his possession relating to such moneys, was held a sufficient description of letters in his hands relating to the moneys.⁽ⁱ⁾ "All and every letters written by the said plaintiff to the said defendant relating to the matters in dispute in this action," has lately been held sufficient as to a particular letter so written by the plaintiff to the defendant touching a matter in dispute in the action. Patteson, J. said, mentioning the parties by and to whom such letters were addressed, was enough.^(j)

Thus it will be seen how the notice may be varied, to meet any material paper in the opposite party's hands, or under his control. Its service once is enough; and there is no need of repeating it every time the cause is adjourned. The notice is sufficient, even as to a re-trial on appeal from the justice.^(k)

Notice is not necessary where, from the nature of the suit, the party knows that the paper will be drawn in question; as if he be sued for it, in trover. Nor is it necessary where he has fraudently got possession of it, from a third person, in order to prevent his producing it under a *subpœna duces tecum*.^(l) The giving of this notice to produce the paper, may always be proved by the party, as we shall presently see. It may, of course, be proved by a third person even though he be incompetent by reason of interest. In either case it may be proved, if oral, by the one who gave it, or one who heard it given; or, if in writing, it may either be proved by parol, or by a duplicate original, or copy, accompanied with an oath of delivery.^(m) Though the paper lost be a negotiable promissory note, yet the plaintiff may recover thereupon, unless it be shown that the note has been negotiated; for this will not be presumed against the plaintiff.⁽ⁿ⁾ But the statute now makes the giving security, a condition of recovery in such case. 2 R. S. 327, 3, § 95, 6. Ante, 182, 3, 232.

The question, whether this inferior evidence shall be received, is preliminary and collateral, addressed to the justice only, and is not taken

(i) See Cowen & Hill's Notes to Phil. Ev. 12, 13, and 1183, 4.

(j) Jacob v. Lee, 2 Mood. & Rob. 33.

(k) Cowen & Hill's Notes to Phil. Ev. 1184. 4 Wend. 623.

(l) 1 Phil. Ev. 441, 2. Cowen & Hill's

Notes, 1193.

(m) 1 Phil. Ev. 445, 6, and Cowen & Hill's Notes, 1197, 8.

(n) 10 John. 104. Vid. ante, 182, 3, 232.

as a part of the regular evidence in the course of the trial. Wherefore, in order to show that the subscribing witness is not capable of examination, (except for the infamy of the witness, on account of some crime, in which case the record of conviction, or a copy thereof, must be produced, and verified in the usual form;) the party himself, who wishes to introduce the evidence may be put under oath and examined by the justice, touching the facts which he insists upon as changing the degree of testimony; as, that the subscribing witness is dead, &c. And he may also be thus examined, to prove the loss or destruction of a paper, or its absence beyond the jurisdiction of the court. So, to prove notice to the opposite party to produce it. Any witness, however he may be interested, may, as well as the party, be examined to prove the same or similar facts, indeed any facts calculated to show the propriety of letting in the secondary degree of testimony.(o)

The party, or the interested witness, is not, in this case, to be sworn, generally, to tell the truth, &c. upon the issue joined. This would make him a competent witness in all respects, and the oath would be binding upon him as such, which would be absurd.

Form of the oath.

You do swear that you will true answer make, to such questions, as shall be put to you, touching your ability to procure the attendance of A. B., subscribing witness to this paper, as a witness in this cause.

Or, "touching the power, or control you have over any paper which would be proper evidence in this cause," (*or other point of enquiry, proper to be put to the party, or the witness interested, but none other.*)

It must then appear that the party has, either used due diligence to enquire out the witness gone, or paper lost, &c. and failed, or that the witness or paper is out of the reach of the process of the court, or other fact necessary to let in the inferior proof.(p)

Whenever a party is examined touching the loss, the opposite party may be examined in reply, to disprove the loss and account for the instrument.(q) When a witness adduced to prove the loss is interested, an oath in substance as above, varied to meet his case, should be administered to him. 4 Wend. 369, 375.

(o) Cowen & Hill's Notes to Phil. Ev. 705, 1294 to 1299, 1355. Id. Ev. 133, 138, 1197, 1218, 1231, 1346, 1222 to 1233. 1551.

(q) 2 R. S. 327, § 94.

(p) Vid. Cowen & Hill's Notes to

If the paper be produced pursuant to the notice, the act of producing it, is, *prima facie*, evidence of its execution, if the party producing it be a party to it, or claim any right or interest under it. But in other cases, it must be proved in the usual manner.(r)

RULE IV.

In the case of all peace officers, justices of the peace, constables, deputy sheriffs, &c., custom-house or other officers, and indeed all public officers, from the highest to the lowest, proof that they are reputed to be or have acted as such, is sufficient, without the production of their appointments.(s) And an officer, duly commissioned and acting in his office, is presumed to have taken the regular oaths.(t)

RULE V.

Where, by law, certain acts are to be done by a public officer, the law always intends that they have been done, until the contrary be shown.(u) Thus, on a conviction for felony, it is presumed that the district attorney has delivered in a transcript to the court of exchequer;(v) and within the same principle, where a justice issues a warrant, attachment or execution, the law would doubtless presume that he did so upon the proper proof, and that such process is regular; and so, where he renders a judgment, the previous proceedings will be presumed regular; so, where commissioners lay out a public highway, the necessary steps for the purpose will be presumed. And so of any another act, which it is made the positive duty of an officer to perform, or see performed, as incident, or leading to the official act given in evidence. I put the above cases by way of example, as familiar instances, which I conceive to come within the last mentioned rule, though it is of frequent practical application in numerous other cases. It lies with the party wishing to impeach these acts, to avoid them by showing some slight proof, at least, that every thing is not regular, when the burthen of proof will shift to the other side.(w)

It follows as a general rule, that all material writings preliminary to the official act in question, are presumed to have been executed; and so need not be proved in the first instance. The rule is of extensive appli-

(r) 1 Phil. Ev. 450. Cowen & Hill's Notes, 1205, 6.

(s) 1 Phil. Ev. 226 Cowen & Hill's Notes, 554, 627.

(t) 2 Gallis. R. 15.

(u) 14 John. 182.

(v) Id.

(w) 1 Phil. Ev. 195, and Cowen & Hill's Notes, 296.

cation, and reaches every official act, whether based on a writing or other thing.

With regard to those steps which are necessary to confer jurisdiction on inferior courts, when they are examined on evidence, such as an oath to obtain a warrant, or a bond to warrant an attachment, the question perhaps remains open, whether you are to presume that they were taken, or presume the contrary, till they are proved.(x) The cases are full to the point that they must appear in pleading. But why they are not to be intended, like other official acts, until their absence be proved by the party seeking to impeach the proceeding, it seems difficult to demonstrate upon principle.(y)

A word here with respect to the nature of presumptive testimony generally, which is of daily occurrence in all our courts of justice.

Evidence consists either of *positive* or *presumptive* proof. The proof is *positive*, when a witness speaks directly to a fact from his own immediate knowledge; and *presumptive*, when the fact itself is not proved by direct testimony, but is to be inferred from circumstances, which either necessarily or usually attend such facts. It is obvious, therefore, that a presumption is more or less likely to be true, according as it is more or less probable that the circumstances would not have existed, unless the fact which is sought to be inferred from them had also existed; and that a presumption is to be relied on no longer, when the contrary is actually proved. In order to raise a presumption, it cannot be necessary to confine the evidence to such circumstances alone, as *could* not have happened, unless they had been also attended by the alleged fact; for that would, in effect, be to require, in all cases, evidence amounting to positive proof; but it will be sufficient to prove those circumstances which *usually* attend the fact. If the circumstances be such as may afford a fair and reasonable presumption of the facts to be tried, it is to be received and left to the consideration of the jury, (or of the justice sitting as a jury,) to whom, alone, it belongs to determine on the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue. However, for the purpose of trying the weight and effect of such presumptive proofs, it will often be of the utmost consequence to consider, whether any other fact happened, which might have been attended by the same circumstances, and with which of the facts they are most consistent. Vid. 1 Phil. Ev. 155, G. Beccaria, ch. 14, observes, that "the

(x) Vid. Cowen & Hill's Notes to Phil. Ev. 305, 905, 906, 1013 to 1016, 1021, 1288.

(y) See this question some considered in Downing v. Rugar, 21 Wend. 178, 183, 4.

following general theorem is of great use in determining the certainty of a fact. When the proofs are dependent upon each other, that is, when the evidence of each witness, taken separately, proves nothing, or when all the proofs are dependent upon one, the number of proofs neither increase nor diminish the probability of the fact; for the force of the whole is no greater than the force of that on which they depend: and if this fails, they all fall to the ground. When the proofs are independent of each other, the probability of the fact increases in proportion to the number of proofs: for the falsehood of one does not diminish the veracity of another."

The object of a chain of proofs, inconclusive by themselves, but connectedly leading to the proof of a fact, is to arrive at that sort of probability which Beccaria makes synonymous with moral certainty: "because every man in his senses assents to it from an habit produced by the necessity of acting, and which is anterior to all speculation." He very justly observes in the same chapter, that "it is much easier to feel this moral certainty of proofs, than to define it exactly." And to judge of this result, "nothing is wanting but plain and ordinary good sense." The application of these remarks must generally depend upon each case as it arises, though there are some few instances mentioned in the books, which admit of legal certainty.

A child born during lawful matrimony, is presumed legitimate. This may be disproved by circumstances, as showing the husband to be under the age of puberty, or laboring under some other natural disability, or his continued absence, or other circumstances repelling strongly the presumption of access. A child begotten and born after a divorce from bed and board, is presumed illegitimate until access be proved.(z)

A receipt for rent down to a certain day, is strong presumptive evidence, that all rent previously accrued, had been paid, until the contrary be proved. 15 John. 479. Proof, that the plaintiff and other workmen of mine, come every week to receive their pay, and that I was in the habit of paying weekly, and that the plaintiff has not been heard to complain of non-payment, is presumptive evidence of payment. An order to pay money in the hands of the drawee, is evidence of payment; otherwise, of an order to deliver goods. A cash account, shown to the defendant and not objected to, is evidence for the consideration of the jury. Possession of land or a chattel is, *prima facie*, evidence of property.(a)

Judgments of courts of record and debts due on sealed instruments are presumed to be paid after the lapse of twenty years. But the pre-

(z) 1 Phil. Ev. 158, 9.

(a) Id. 159, 160, and Cowen & Hill's Notes, 314.

sumption may be repelled by showing payment of some part, or a written acknowledgment. 2 R. S. 228.

Sometimes the acts of the party are conclusive, and supersede all higher or other proof. The most important instances, of which, for our purpose, are, the case of a tenant, who cannot dispute the title of his landlord ;(b) and a man who suffers a woman to pass in the world as his wife, cannot contradict the fact of her being so, against one who has given credit on the faith of such appearance.(c)

RULE VI.

Hearsay is not evidence.

To this rule, there are the following exceptions :

Exception 1st.

To prove a pedigree, death, relationship, marriage, whom one married, his number of children, time of marriage, &c. the declarations of members of the family are admissible, as well as descriptions in wills, upon monuments, entries in family bibles and registry books, &c. &c.(d) And the declaration of one's deceased father,(e) or a memorandum of the time of one's birth, made by his deceased father,(f) is evidence of his age. But in order to make such declarations admissible, as to pedigree, the witness should be connected with the family, or have some personal knowledge of the facts of which he speaks, or have derived his information from persons connected with the family.(g) The original entry, kept by a religious society, of the births and deaths among its members, is evidence.(h) Hearsay, and general reputation, are not admissible, to establish the freedom of an ancestor,(i) nor will hearsay be admitted as to the place of one's birth.(j) And in none of the above cases is it receivable when the relation who made the declaration is alive and within reach of the process of the court and can himself be produced.(k) Nor is the declaration admissible if made after a suit is brought to try the question, or even after the dispute has arisen.(l)

(b) Cowen & Hill's Notes to Phil. Ev. 201.

(c) Id.

(d) 1 Phil. Ev. 238, 9. Cowen & Hill's Notes, 612, 613, 615, 616.

(e) Id. 240. Cowen & Hill's Notes, 621, 622.

(f) Id. id.

(g) Id. 233, 239, 240. Cowen & Hill's Notes, 617 to 620. 2 Mood. & Rob. 28.

(h) 6 Binn. 416.

(i) 1 Wheat. 6. Vid. Cowen & Hill's Notes to Phil. Ev. 559.

(j) 1 Phil. Ev. 241. Cowen & Hill's Notes, 624.

(k) Id. 240, and Cowen & Hill's Notes, 621.

(l) Id. 241, and Cowen & Hill's Notes, 625.

Exception 2d.

Declarations of a third person, when they go to charge him with a debt, or otherwise operate against him, are evidence in case of his death; as an entry in his book, charging himself with the receipt of money on account of a third person, or acknowledging the payment of money due to himself. (m) In the cases cited, the entries were made by a deceased person, and were against his interest. If I sue for money paid, as surety on bond, note, &c. the production of the bond, &c. and a receipt of the obligee, &c. for the money, after proving them, is enough, *prima facie*, to sustain my action. (n) So the declaration of a person deceased, who once owned goods, that he had sold them to A. is good evidence against B. who claims under the deceased, by some sale or act of his, subsequent to the declaration. (o) Thus, where A. has a horse in his possession, but admits that it belongs to B. and after this admission sells and delivers it to C. in an action by B. for the horse against C., A. being dead, his admission is evidence against C. But such declarations, subsequent to the sale, would be inadmissible. (p) Indeed, the doctrine appears to be well established, that an admission, made relative to the property in question, by one who afterwards sells it to another, is as much evidence against the one thus afterwards purchasing, as it would be against the vendor before the sale, and this, even though the vendor be still alive. (q) And both the declarations and conduct of the vendor, before the sale, are equally admissible to show fraud in the transfer, (r) though this would be otherwise in all cases of declarations or conduct subsequent to the sale. (s)

Exception 3d.

The admissions of the party are always evidence against him, even though he sue merely as trustee for another; (t) and so is the admission of the person beneficially interested, though he be not named as a party in the suit. (u) An admission of one of several joint plaintiffs is evidence against all; (v) and the admission of a joint debtor, though not a party to the suit, is evidence against those who are defendants. (w) But

(m) 1 Phil. Ev. 255.

(n) 4 John. 461.

(o) 1 Taunt. 139.

(p) Cowen & Hill's Notes to Phil. Ev. 662.

(q) Cowen & Hill's Notes to Phil. Ev. 644 to 661.

(r) Id. 650.

(s) Id. 655, 662.

(t) 1 Phil. Ev. 90.

(u) Id. 90, 91. Cowen & Hill's Notes, 167.

(v) 1 Phil. Ev. 92.

(w) Id. 93. Cowen & Hill's Notes, 173, 4.

the acknowledgment of an account, by one partner, after a dissolution of the partnership will not bind the other; (x) though it would be sufficient to take the case out of the statute of limitations. (y) The admission of one is inadmissible to prove another his partner. (z)

In an action for a mere wrong, as in trover, trespass, or case, against joint wrong doers, the confession of one defendant, either as to their being joint trespassers, or wrong doers, or any other fact, is not evidence against the others; though it is otherwise as to confessions which are accompanied with the wrongful act, after having first established, by evidence, the wrongful combination; for then the act of one is esteemed the act of all. (a) And in an action for a combination, in committing a fraud, the confession of one defendant has been held evidence as to the others, the combination being first proved. (b) But in trespass, where the acts are entirely distinct and unconnected, as if done or said at a different time or place, by one joint trespasser, they are not evidence to enhance the damages, and ought not to be received. (c) These confessions of the party, whether by parol or in writing, are not conclusive, but may be done away by proof. Thus, even a receipt, though absolute in its terms, may be explained or contradicted. (d) And so, where a party had admitted his promissory note, yet he was allowed to show that the signature was not genuine. 10 Mass. R. 39.

Some of these remarks must be taken with considerable qualification. The admission of a mere trustee or nominal plaintiff, (e. g. an assignor of a debt,) made after he has parted with all his interest to the one who sues in his name, the defendant knowing or having notice of that fact when the admission was made, is not competent evidence against the real plaintiff, i. e. the one for whose benefit the suit is brought. (e) There is, moreover, a large class of admissions absolutely conclusive on the party. Among these are, *first*, admissions made or implied by the course of special pleading, with regard to which it is a rule that a fact not denied is admitted. So, *secondly*, where an admission is made for the purposes of the trial, in order to save the trouble of proof; and *thirdly*, when it is made with a design to influence the conduct of another, and has that effect, as if he have parted with some right, brought a suit, or incur-

(x) 3 John. 536. Ante, 769. Cowen & Hill's Notes to Phil. Ev. 173, 4.

(y) Cowen & Hill's Notes to Phil. Ev. 173.

(z) 1 Phil. Ev. 92, and Cowen & Hill's Notes, 173. Ante, 92.

(a) 1 Phil. Ev. 93, 4. Cowen & Hill's Notes, 176.

(b) Cowen & Hill's Notes to Phil. Ev. 177, 8.

(c) 1 Phil. Ev. 94. Cowen & Hill's Notes, 176.

(d) 1 Phil. Ev. 108, and Cowen & Hill's Notes, 213 to 216.

(e) Cowen & Hill's Notes to Phil. Ev. 164.

red some expense upon the faith of the admission, or been drawn in to perform any other act. In this last case, the fact admitted shall be taken for true in favor of the party who has acted upon the faith of it, unless the party who made it, shall appear to have been led into the admission by fraud, coercion or mistake. And there is even some doubt whether mere mistake shall take from its effect. Under each class, the modern books abound with many illustrations.(f)

Exception 4th.

The acts and admissions of an agent, while acting within the scope of his authority, are evidence against his principal, because they form a part of the contract or transaction itself, but not what he may have said or done at another time. Upon the same principle, the confessions of a deputy sheriff, made while he is acting within the scope of his authority, will bind the sheriff; for instance, what he may say at the time of executing a writ, or concerning the custody of a debtor upon execution in his hands, or concerning any other execution, while the same is in force in his hands; but these confessions, in order to bind the sheriff, are restricted to the business which the deputy has in hand, while it is going on, and one case, which seems to look a little farther than this, is overruled. If one refer to another for information on a disputed fact, as authorized to answer for him, or employ an agent to make propositions for him, the consequent replies or propositions are evidence against him, the same as his own would be.(g)

It may be observed, with regard to admissions generally, that a mere proposition by way of compromise, is not evidence against the party, though the admission of certain articles of charge, in the course of a settlement, or before arbitrators, would be evidence. Whether the offer is merely by way of compromise, must be gathered from the circumstances in proof. The case commonly put is, where A. claims of B. fifty dollars, and B. offers him a gross sum of twenty-five or thirty dollars, or other amount, in order to settle the claim, this ought not to be received as evidence.(h)

The admissions of the party are evidence against him, whether made in writing, or by parol, whether before or after the commencement of the suit. And so is the recital of a fact in a deed, executed by the party,

(f) Vid. Cowen & Hill's Notes to Phil. Ev. 99 to 102; also 105, 6, and Phil. Ev. 199 to 209. 1 Phil. Ev. 170, 171, and Cowen & Hill's Notes, 444 to 451. 191.
 Clark v. Fairchild, 22 Wen. 576. (h) 1 Phil. Ev. 108, 9, and Cowen & Hill's Notes, 218.
 (g) For these propositions, vid. 1

or an admission in an answer in chancery. (i) And the receipt of a bond and warrant of attorney, stating the particulars thereof, has been held evidence of the bond and warrant, even without producing them. (j)

The whole of a party's answer, confession or admission, must be taken together, in order to show distinctly the full meaning and sense of the party; as where I say, "True, I received a dollar of the plaintiff, but it was my due;" "True, I shot the plaintiff's dog, but he assaulted me in the highway;" these confessions will not sustain an action against me. "True, A. signed the note jointly with me, but he did this as surety, and not as partner." This is not an admission that A. and I are partners. "I bought the goods, but paid for them;" this will not sustain an action against me for the goods. If a party, in order to establish a credit in his own favor, show an account made out by the opposite party, the whole must be taken together, but the party producing it will be at liberty to disprove any of the charges contained in it. 5 Taunt. 245. "True, I borrowed the money, but repaid it," will not sustain an action against me for money lent. "True, I was captain of the ship, but never employed the plaintiff," will not help in sustaining an action against me for the wages; though it is by no means true that equal weight must be given to what is in favor of the party, with that which makes against him. Of course the former may be avoided or falsified by other evidence; when the latter will stand alone. (k)

What a person has sworn to as a witness, is evidence against him, even though the questions which he answered were exceptionable, and he might have demurred to them; and so, what he has confessed as a criminal, under a promise of pardon. (l)

How far character, &c. is admissible in evidence, in the action of adultery, or for seducing the plaintiff's daughter, or servant, *vid. ante*, 353, 4.

A large class of declarations made by third persons, and even by the party, are entirely distinguishable from hearsay. I mean such as are made by any one, at the time when an act is performed, or is in progress of performance by him. Examples are, what a party says when making a contract, or in taking possession of property, or while holding such possession. So, declarations made while doing any business, official or private, whether in the party's own right, or in behalf of another.

(i) 1 Phil. Ev. 89, and Cowen & Hill's Notes, 159, 160, 161.

(j) 14 John. 404.

(k) 2 John. Ch. Cas. 90. 2 Ev. Poth. 156, 158. Doug. 788. 2 Bos. & Pul.

548. 1 Phil. Ev. 110, and Cowen & Hill's Notes, 223, 225, 230, 247.

(l) 1 Phil. Ev. 89, and Cowen & Hill's Notes, 161, 2, 240.

Such declarations make a part of the transaction, *res gesta*, and are used to show the intent or design of the actor, and the character of the act. To this end they are admissible, not only against, but even for, the person who does the act. The instances in the books are very numerous.(m)

The decease of a third person, who has made an entry of a fact in writing, with a view to perpetuate its memory, often renders the entry evidence. This rule extends to a large portion of very important testimony, which is received, after death, in some measure, on the ground that it was a part of the transaction. It extends to all entries made in the usual course of official and even private business, c. g. entries by deceased notaries public, concerning protests and notices, which is the case usually put as an example of official entry. Among entries relating to private business, it has been applied to those made by attorneys, clerks, surveyors, engineers, runners and messengers of banks, &c. But it does not extend to oral declarations. The entry must be produced, or its absence accounted for. The witness must be shown to have died. His absence beyond the jurisdiction of the court is not enough. In general, the entry must have been made by the deceased person himself: not by another for him; though if such were the usual course, and both be dead, the entry is admissible. It must be shown to have been made in the usual course of the deceased's duty or business.(n)

Again: A witness who has formerly been examined in a suit between the same parties, and where the point in issue was the same, is since dead. What he swore on the former trial, may be proved by one who heard him. And so when the witness is kept away from the second trial by the contrivance of the opposite party. A foundation must always be laid for this proof, by showing in a regular and legal manner, the pendency and trial of the former cause.(o) It was held in England that the very words of the deceased or absent witness must be remembered; otherwise his testimony cannot be received. But this strictness is questioned by Philipps, and repudiated by the American courts. It has been found to be impracticable and absurd. The testimony is therefore to be shown in the same way as you would prove any matter of hearsay; by notes, memoranda, or naked recollection of the substance.(p)

(m) Vid. 1 Phil. Ev. 231. Cowen & Hill's Notes, 157, 8, 585 to 606.

(n) Cowen & Hill's Notes to Phil. Ev. 674 to 679.

(o) 1 Phil. Ev. 230, 1, and the notes

of Cowen & Hill, referred to at these pages.

(p) 1 Phil. Ev. 231. Cowen & Hill's Notes, 578 to 585. 15 Wend. 193.

RULE VII.

Former verdicts, judgments and decrees, are evidence, between the same parties ; and between these, they are conclusive, as to all matters determined by them.(g)

But in order to be conclusive in the second suit, the parties in the first, must sue in the same *quality or character* as in the second. Thus, if I sue for a claim in my own right and fail, I am not precluded by this judgment, from afterwards suing for the same cause, as executor or administrator ; and so of the like cases.(r)

A judgment is equally evidence, where the parties are really, though not nominally the same in both suits ; as where one suit is in favor of a party beneficially interested, and the other in favor of his trustee.(s)

A verdict or judgment is also evidence against all such, as claim under the parties to the suit. Thus, if I sue upon a promissory negotiable note, and am defeated upon evidence of payment, and afterwards sell the note to A., the judgment against me is conclusive against A.(t)

Again:—I am sued in trespass or trover for a chattel, which I bought of A., who is bound to warrant the title, and I give A. notice of the action, and a judgment goes against me ; that judgment is conclusive against A., in an action against him, upon the warranty. So, if A. is to indemnify me, against a particular claim, and a suit is commenced against me upon which I give A. notice, and a judgment is had ; this is conclusive against A., in an action for indemnity. And so, in like cases.(u)

These remarks are confined to cases where the former judgment, &c. is adduced in proof of the matter tried or determined. A record or judicial proceeding is always evidence of its own existence, even as against strangers.(v) Thus, a verdict or judgment in a criminal suit, in behalf of the people, is not evidence on the same matter coming directly in question in a civil cause.(w) But should you desire the record, as evidence to shew that A.'s witness had been convicted of felony, it would be admissible, though A. was a perfect stranger to the prosecution. Even where the verdict or judgment is between the same parties, it will not conclude, unless it be rendered on the merits. Thus a nonsuit, or judgment on special de-

(g) 1 Phil. Ev. 320, l. 358, and the notes by Cowen & Hill, here referred to. See especially, note 558, p. 804 to 810.

(r) 1 Phil. Ev. 323.

(s) Id. 324.

(t) Id. id.

(u) Cowen & Hill's Notes to Phil. Ev. 816 to 818.

(v) Id. 820 to 824, 881.

(w) 1 Phil. Ev. 336, and Cowen & Hill's Notes, 850.

murrer, would not conclude ; nor would a verdict for the defendant in an action on a note, conclude the plaintiff, if rendered on the ground that the note had not yet fallen due.

RULE VIII.

The judgment of a court of exclusive jurisdiction, directly upon the point, is conclusive between the same parties, upon the same matter coming incidentally in question, in another court, for a different purpose.(x)

Thus, the probate of a will, by the surrogate, is conclusive evidence, in civil cases, of the validity of the will.(y) And a condemnation of goods; ships, &c. in a court of admiralty, in a proceeding against the thing itself condemned, is evidence against all the world, as to the matter in question, upon which the condemnation was founded, whether such court be foreign or domestic ; though, the condemnation is held not to be conclusive in this state.(z)

But, what is most material to our purpose, a conviction for any offence, by a justice of the peace, having competent jurisdiction, is, till reversed, or quashed, conclusive evidence in his favor, in an action for any proceeding under the conviction. Thus, a conviction under the 2d section of the act, to prevent forcible entries and detainers,(a) a conviction, and it seems merely the warrant of commitment for a contempt, are conclusive evidence of the facts therein contained.(b) And so in all the innumerable cases of conviction before magistrates ; and they are not bound to show the regularity of the conviction ; and even though it be informal, yet, if the magistrate have jurisdiction, it will protect him.(c)

It is a general rule, with respect to special and limited jurisdictions, that where a person acts as judge, within his jurisdiction, he will not be liable to have his judgment examined, in any action brought against him. Hence the facts upon which the conviction is founded, cannot be traversed.

The validity and conclusiveness of all proceedings before justices, and other inferior tribunals, may always be questioned by showing that they had no jurisdiction of the subject matter. Thus, should a justice try an assault and battery, slander, malicious prosecution, &c., his judgment

(x) 1 Phil. Ev. 340.

(y) Id. 344, and Notes 858.

(z) Cowen and Hill's Notes to Phil. Ev. 883.

(a) 8 John. 44. 1 R. L. of 1813, 96.

(b) 2 Bay, 1.

(c) See on this subject, Cowen & Hill's Notes to Phil. Ev. 993.

would be no protection to him or the party, though it might be to officers acting under his process. (d)

Where a suit was discontinued, by the plaintiff's not appearing, and the justice afterwards gave judgment against the defendant, without issuing process, or any notice being given, and without the defendant's appearing, it was held that this judgment was void, and might be impeached, even in an action of debt on the judgment before another justice. (e)

In cases where a judgment is admissible against a stranger, it may be impeached, by his proving that it was obtained in order to defraud him; as if it were confessed with a view to cheat creditors, among whom he is one. But fraud cannot be shown, if he were a party or privy to the proceeding. (f)

The sentence of any foreign court, of competent jurisdiction, directly deciding a question which was properly cognizable by the law of the country, seems to be conclusive here, the same as if rendered by one of our own courts. (g) And the judgment of a court in a neighboring state, having jurisdiction of the subject matter, and in which the defendant has been duly notified to appear, is conclusive in the courts of this state, whether it come directly or collaterally in question. (h)

SECTION III.

OF PAROL EVIDENCE TO EXPLAIN OR CONTRADICT WRITTEN TESTIMONY.

It is the duty of the courts to be astute, and even ingenious, in upholding all contracts of sale, promise, covenant, &c., so far as may be; and in giving them effect, according to the intent of the parties. So far as a written contract is clear, either in its particular words, or upon a consideration of its legal effect, no evidence extrinsic to the writing can be received to contradict, vary or explain its meaning. (i) Thus, in case a note is expressed to be payable such a day, you cannot show that the parties

(d) For the above matters as to the protective effect of judgments and convictions before inferior magistrates, vid. Cowen & Hill's Notes to Phil. Ev. 987 to 1025, and see ante, 393 to 409.

(e) 15 John. 244.

(f) Cowen & Hill's Notes to Phil. Ev. 854 to 856.

(g) Vid. Cowen & Hill's Notes to Phil. Ev. 891 to 896.

(h) Vid. id. 896 to 903.

(i) Id. 1466.

intended some other day. Again : a promise to pay, simply, without saying what day, is, in legal effect, a promise to pay on demand ; and therefore you cannot show, orally, an intent to pay at any particular day.(j)

But written contracts are often obscure or ambiguous, owing to their using words which are in themselves of doubtful or double meaning, or which are made so by referring either expressly or tacitly to some subject not specifically described by them. In all these cases they may be made certain. This cannot be done by showing what any party or parties declared, either before or at the time of the writing executed, that they meant by the particular words used in it. It must generally be done by circumstances entirely independent of such declarations. Take the case of words doubtful on their face, or even having no meaning of themselves to the mind of the general reader ; yet to a man conversant with the particular subject, trade, or business to which they relate, or the local language of the place where the contract was drawn, it may be very plain. He may, therefore, be received to explain the meaning. Vid. *Ryerss v. Wheeler*, 22 Wend. 148, and cases there cited. Words are sometimes abbreviated in contracts, and they are sometimes written in a foreign language ; but the contract ought not for that reason to fail. So where a word may mean two things ; the word *freight*, for instance. This may mean the *rent of a ship*, or the *cargo*. In a contract assigning the *freight* of a certain ship, therefore, which leaves it doubtful what the parties intended, you may show circumstances to fix the meaning. For instance, if neither party owned the ship at the time, but the assignor did own the cargo, you might infer from thence that they meant to speak of the latter.(k) With regard to the subject matter of the contract, extrinsic evidence is almost always necessary ;(l) and it is admissible, though the reference to it by the contract be in itself altogether uncertain and unintelligible. Thus, suppose a man make a contract to sell *the horse*, without any other words. On showing that at the time he owned but one horse, the description would be made sufficiently certain ; for it will be intended that he would not sell a horse not his own ; and having but one, he could not refer to any other of his own. The late case of *Fish v. Hubbard's adm'rs*, 21 Wend. 651, furnishes in itself a case of as great uncertainty ; and many other like instances are there put in the opinion of the court, p. 663 to 665.

(j) Cowen & Hill's Notes to Phil. Ev. 1468, 1470.

(k) Id. 1358, 1361, 2, 1368, 1406, 1409, 1412, 1419.

(l) Id. 1399, 1420.

So, where the words or phrases of reference appear to be certain on their face, an ambiguity often arises from an attempt to apply them. The difficulty thus arising from extrinsic matter is therefore called a *latent ambiguity*. As, where there are several persons or things which will answer to the description in the agreement. Thus, if *James Jackson* agree, in writing, to sell his horse to *John Doe*, and there be two or more persons of that name, parol evidence may be given to show which was intended by *Jackson*. So, if *Jackson* sell *Doe* his black horse, and he have two black horses, parol evidence may be given to show which was intended, and so in the like instances. Here it is said the declaration of the party at the time may be received; though this is confined to cases where the designation in the contract applies equally to each of two persons or things.(m)

You may show another writing executed at the same time, of an equal degree with the main one, varying or defeating the latter; for these will be deemed parts of one entire contract. So the writing may refer as a part of itself to another contract, written or oral. Then, of course, the latter may be proved by writing or parol, according to the fact.(n) So, an absolute bill of sale may be shown by parol to have been intended as a mortgage.(o) Blanks and clerical omissions may be supplied.(p) Strangers, not parties, may show the true intent by parol.(q) A mere receipt may be thus contradicted or explained, even by the party.(r) So of a clause in a deed or bill of sale, acknowledging the receipt of the consideration.(s) So, the maker may, as between himself and the payee, contradict the acknowledgment in a note, of value received.(t) The party may also show fraud, or illegality of consideration;(u) or vary, by parol evidence, the time of delivery from the date.(v) So he may vary the contract by showing a subsequent one, on good consideration, and equal in degree.(w)

(m) Cowen & Hill's Notes to Phil. Ev. 1362, 3, 4.

(n) Id. 1420, 1, 2, 3.

(o) Id. 1432.

(p) Id. 1394.

(q) Id. 1436, 8.

(r) Id. 213, 216.

(s) Id. 216, 217, 1441.

(t) Id. 218, 1458.

(u) Id. 1438, 1445, 1448.

(v) Id. 1453.

(w) Id. 1477.

SECTION IV.

HOW FAR BOOKS OF ACCOUNT ARE EVIDENCE, IN FAVOR OF THE PARTY KEEPING THEM.

The cause in which the admissibility of a party's books, as evidence in his favor, was established and restricted, originated in a justice's court, where this species of evidence is much oftener introduced than before any other tribunal. *Thayer* sued *Vosburgh* before a justice, for butcher's meat, furnished by him to *Vosburgh* and his family. *Thayer* proved, 1st, that he had been in the daily practice of supplying *Vosburgh* and his family with meat during the period for which he claimed payment. 2d. He proved by some of those who had dealt with him, that he kept just and honest accounts. 3d. That he had no clerk. He then offered his books of account in evidence. They were objected to, but admitted by the justice, who gave judgment for *Thayer*. *Vosburgh* removed the cause by certiorari to the supreme court,(x) where the judgment was affirmed, and the following restrictions laid down, within which all account books, without regard to the particular employment of the party keeping them, are made evidence in his favor.

1. The charges to be proved must be such as are *matter of book account*. A book, therefore, would not be evidence of money lent, had and received, or paid, laid out and expended, for the use of the opposite party.

2. They are not evidence of a single charge ; because there exists, in such case, no regular dealing between the parties.

3. They are not to be admitted, where there are several charges, unless a foundation is first laid for their admission, by proving,

1. *That the party had no clerk.*
2. *That some of the articles charged, had been delivered.*
3. *That the books produced, are the account books of the party.*
4. *He must prove, by those who have dealt and settled with him, that he keeps fair and honest accounts.*

Under these restrictions, they are evidence, to be left to the jury.

Platt, J. dissented, and concluded a very able opinion with these remarks : " The rule, as now proposed to be modified, is very complicated,

(x) 12 John. 461.

and difficult in its application ; and, therefore, extremely liable to be misapplied and perverted, especially in justices' courts, where, according to the established rules in regard to setting aside verdicts, infinite frauds and oppression may be screened by the latitudinary powers of juries, in the application of such a complex rule. The case would seldom indeed occur, where this court could, on justifiable grounds, control the verdict of a jury, upon the point now under consideration. I think, therefore, the judgment of the court below ought to be reversed."

By the above decision, account books are made evidence *for the consideration of a jury*, or which is the same thing, the *justice*, where no jury is called for by either party. But the weight of such evidence, in the scales of justice, is not, and cannot be assigned, and must, therefore, depend upon various circumstances, calculated to increase or diminish it in the view of enlightened experience. The above remarks of his honor, Judge Platt, are sufficient to inculcate extreme caution in the application of the rule laid down by a majority of the supreme court.(y)

I cannot enlarge upon this topic more usefully, than by introducing the remarks of the late Chief Justice Pennington, in his excellent treatise upon the justices' court of New-Jersey.(z) He says of a similar rule which prevails in the courts of that state, "Books of account are very frequently produced in evidence. The manner of keeping them in the country, renders them, in many instances, very unsatisfactory evidence, and makes it necessary to examine them with caution. They are admitted from the necessity of the thing, in derogation of an ancient principle of the common law, that a party ought not to be permitted to furnish evidence for himself. The constant, continued and repeated dealings, and daily intercourse of a commercial or pecuniary nature, which one citizen hath with another, especially as the country approximates to a manufacturing and commercial state, renders it next to impossible to call witnesses to every transaction of the kind, and very laborious and inconvenient to reduce to writing, under the hand of the party, every contract which our wants and interests are hourly leading us to engage in. This hath given rise to the practice of memorandums in the form of books ; if these memorandums are to have no effect, it would be a useless waste of time to keep them. These memorandums, or books of account, are, by the general assent of the community, received as evidence of the transactions written in them ; and have at length received the sanction of our

(y) See also *Linnell v. Sutherland*, 11 Wend. 568, and per *Sutherland, J.* in *People v. Genung*, 11 Wend. 21. *Cowen, J.* in *Merrill v. The Ithaca & Owego*

Rail Road Co. 15 Wend. 593, 4. *Sickles v. Mather*, 20 id. 72.

(z) *Penning. on Small Causes*, 15.

highest courts of justice. Being, however, the acts of the party producing them, and made by himself, for the purposes of evidence, they are so far from being conclusive evidence, that they are liable to the strictest scrutiny, and are, at most, presumptive evidence; and as such, like all other presumptive evidence, liable to be rebutted or counteracted by every kind of evidence that can be raised against them. There is one essential requisite to the introduction of these books, which is, that the party offering them in evidence, must first prove that the book he offers, is his book of account, in which he usually enters and keeps his general accounts with those persons with whom he deals; for, if a man were to keep one book for one man's account, and another book for another, these books would not be such account books as he would be entitled to give in evidence; besides, it is essential that the books offered are made to appear to be the actual books of the person offering them, and not the books of any other person; also, that it is not a book made up for the occasion, but a book in which the person offering it, keeps the account of his ordinary dealings, and a book of original entry. Books of account derive much of their credit from the manner in which they are, or ought to be, kept, that is, as a kind of diary, or daily journal of the transactions of the persons who keep them, who enter every sale, or other act, as it occurs. Books kept in this way, are entitled to the more credit, from two causes; first, that a memorandum made of a transaction at the time it took place, is more likely to be correct, than if it is entered from memory, some time afterwards; second, men are more likely to be tempted to make false entries in their books, a long time after the transaction hath happened, and, frequently, after a difference hath taken place, than at the time and place of the original transaction. Some persons keep their books in this way: they have but one book, and that in the nature of a ledger, wherein they open on one page, one man's account, and on another page, another man's account, and keep no day book at all. Books kept in this way, open the door for the grossest frauds and injustice; and the most scandalous iniquity is daily practiced under it. I am clearly of opinion myself, that books kept in this way ought never to be suffered to appear in a court of justice. But the law is otherwise, and they must be admitted the same as other books, when proved to be the ordinary books of account of the person offering them, in which he makes his original entries. But they ought to be considered the most suspicious testimony that can be offered, little better than the declarations of the party in his own favor. Entries are frequently made after the controversy commences, and accounts opened, years after the transactions have taken place which gave rise to them. And I would here observe, that because the law permits

books of account to be given in evidence, that is, shown to a court and jury, it by no means gives a validity or authority to the contents of them; but the justice or the jury, in case the trial is by jury, must draw their own conclusions. The character of the man who keeps the books, the fairness or unfairness of the books from their appearance, the time and manner of making the entries; whether the items are in the ordinary course of a man's trade or business, or of an extraneous and suspicious nature; whether any and what other evidence is given to corroborate the charges; all these are proper subjects for the due consideration of the justice or jury."

Questions on this species of evidence have rarely come under review of the supreme court in New-York since the decision in *Vosburgh v. Thayer*. The instances in which they have, however, should hold a prominent place in a book designed to instruct the New-York justice. I shall, therefore, first refer to them; and then proceed to a summary of principles and rules coming from other states, which seem to have an application common both to them and New-York, although some of them may not often be capable of application here, owing to our want of explanation by the suppletory oath of the party. This oath prevails in most of the states which allow book accounts as evidence; but it is conceived that this circumstance rather tends to increase the force of authority there, when applied here, at least in respect to all rules which have there been adopted as precautions against the abuse of such evidence. The proposed summary shall be little more than a close abridgment from Cowen & Hill's Notes to Phil. Ev. 682 to 701, where the matter is treated at large, and more with a view to the professional student, than would be admissible here. They comprise a notice of the doctrine as it prevails in eighteen states, three only of which, New-York, New-Jersey and Georgia, appear to reject the party's oath. The other states, most if not all beside the eighteen, reject such evidence entirely. Vid. p. 682 to 688.(1)

In New-York, as in New-Jersey, this kind of evidence is not restricted to any particular sort of business or occupation. It is common to the merchant, mechanic and farmer. Vid. the remarks of Savage, C. J. in *Rathbun v. Emigh*, 6 Wend. 407, 409, and of Cowen, J. 20 Wend. 75. It seems to be no objection, that part of the entries are made by the party, and part by his clerk. *M'Allister v. Reab*, 4 Wend. 483. Though,

(1) It was there suggested, on looking at a case in 1 Blackf. 307, that Indiana admitted this evidence, and that state was included among the eighteen. Since those notes were compiled, the supreme court of that state have held that the evidence is not admissible.

quere, whether the book would then, as such, be evidence beyond the entries made by the party. And if the party have a regular clerk, the necessity which sanctions it, even so far, would seem to be wanting. *Vosburgh v. Thayer* holds that he must have no clerk; and we shall hereafter see that this sort of evidence is, in general, considered as secondary, not receivable when direct proof may be had through others. But *vid.* 20 Wend. 74, 5. Independent proof by a mechanic, of two of the items charged in his book, was held to satisfy the second requisition of *Vosburgh v. Thayer*. *Linnell v. Sutherland*, 11 Wend. 568. The oath of a clerk, that he believes his entries to be true, though he has lost all personal recollection of having delivered the goods charged, makes the books evidence as original entries. *Semb. per Savage, C. J.* in *Lawrence v. Barker*, 4 Wend. 306. But this is common law evidence. 20 Wend. 75. *Per Cowen, J.* in *Merrill v. The Ithaca and Owego Rail Road Co.* 16 Wend. 595, 6. The last cited case holds, that to warrant books in evidence as those of the party, they must be his general books of daily account; not mere memoranda or check rolls, made up as mementos of others' labor in the work done, by the party producing them for his adversary. *Id.* 593, 4. Also, that the entries, if of work done, must be for such as is done in the ordinary course; not of charges on a quantum meruit, for work done pursuant to a special contract, though the opposite party, by violating the contract, may have become legally liable to be charged in that form. *Id.* 594.

Where the triors are convinced that any one entry made by the party, in the particular account, is wilfully false, the whole book should be exploded. Entries must be daily, and particularly made, as the work progresses, or the goods are delivered; not by lumping several days together, or charging a round sum, as for a job, or at so many days. *Anon. N. Y. Sup. Court. MS.* Not yet reported.

Where a manufacturer's servant delivered out the articles, and testified that he, pursuant to the usual course of business at the factory, entered memoranda of the delivery on a slate, with a pencil, which were, in the course of a day to three days, transcribed by his master, into his account book, but in which the servant made no entries; such book was held admissible, in aid of the servant's testimony. Such servant is not a clerk, within the first rule in *Vosburgh v. Thayer*. *Sickles v. Mather*, 20 Wend. 72. This case also holds that, though the transaction be known to third persons, e. g. a servant, yet books are evidence, under the peculiar practice in the state of New-York. *Id.* 75.

1. The subject of book account is confined to personal property sold and delivered, services performed and materials found and provided, and

the use of such property hired and returned. It is not considered an objection that the price be specially agreed on. But see 16 Wend. 594. Personal property does not include choses in action, as a bond or note. The work and labor must in general be done before it is charged.

2. If it appear on the face of the charge, or in any other way, that there is attainable common law proof of the entries, independently of the ordinary book proof, the latter is inadmissible. One instance is the party having a clerk. A school master must prove his services by others. So, where the goods are delivered, or work done by a servant who can prove the fact. So, if goods are delivered to a third person, at the request of the vendee, or on his account; as if they are delivered to his servants. So, if goods be delivered on written orders, or by any third person. But these rules do not all apply in New York. Vid. 20 Wend. 74, 5, cited *supra*.

3. The entries must be made at, or near the time of the transaction. They should be memoranda of transactions as they occur. But the proximity of time must depend on the course of the business. The party may first enter his accounts on a slate, and afterwards transcribe them into his book, if such be his ordinary course in making his entries. Such accounts should, in general, be entered in the book daily. One of two butchers, partners, customarily marked the scores of meat with chalk on a cart, and the other, before the cart went out again, copied the scores into the book; yet this was held receivable. See other instances, 29 Wend. 76. Much attention is paid in this respect to the course of business; as if certain tradesmen are accustomed to charge their work on book, while it is in progress in the hands of their journeymen. This has been made an exception to the general rule, that the work must be actually done, before it can be charged.

4. The entry must be in the book of the party, kept by him for the purpose of his daily accounts, generally, with all those persons who may have dealings with him. 16 Wend. 594. They must be made in the prevalent manner of his keeping the book, and in a regular course with other charges. If they stand insulated, as on the front leaf, not falling into regular order with the other charges; or be on a separate sheet, especially when it appears that the party keeps an account book; or on a leaf torn out of a book, or on one of the last pages, separated from other charges by intervening blank leaves, they are not admissible.

5. The book must contain the original entries made by the party himself; not by another; though this will be excused if he can not write.

6. They may be kept in the form of an ordinary journal or day book, or *leger-wise*, i. e. where the account of each man dealing with the party,

is kept by itself. But it must appear they were intended as an account against the party sought to be charged by them ; not as a memorandum between the party claiming and others, e. g. where the party is a forgerman, and the book is kept by him as a memorandum by which to settle with his customers, though it names the vendees, whom he seeks to charge, and sometimes the price. Vid. 16 Wend. 594. Erasures and interlineations go to the credit of the book. They are open to explanation ; but do not necessarily render it incompetent evidence. But if gross, suspicious and unexplained, they will destroy its credit altogether ; and so of any other fraudulent appearances.

If the day book appear to be posted, the ledger must be produced ; as that may show payments.

Almost any series of figures, abbreviations and words, which can be explained into a signification, will do for particular charges, if conformable to the party's ordinary course of making his entries, the language he speaks, his degree of education and the nature of his business. But they should be specific, denoting the particular work or service charged, and attaching the price or value to each item. Accordingly, a bricklayer's charge of "190 days work" was rejected ; and a physician's charge "for medicine and attendance." And another against General Hampton thus "thirteen dollars for medicine and attendance on one of the General's daughters in curing the whooping cough." A receipt in an account book purporting to be signed by the vendee is not admissible as an original entry ; and any entry, it would seem, amounts to nothing unless the price be carried out.

7. Whether the original entries be relied on as those of the party, or be proved by a clerk who made them, but who is unable to speak independently of the book, it must be produced ; a copy is not admissible, at least not till the absence of the original be satisfactorily accounted for. But books are in neither case evidence of a higher, but rather of an inferior degree to common law proof. If the latter be attainable, the party may of course resort to it ; and it will be no objection that his book is not adduced. But the non-production of it, if the book be called for by his adversary, would be a heavy circumstance against him. If the entries were made by a clerk, and he be dead, his hand writing may be proved. Then, on showing that he was clerk, the entries may be read, and become satisfactory evidence.(1)

(1) This is proper as common law evidence. But it has been held by a very respectable court, that mere absence of the clerk from the state, though permanent, is not an excuse for proving his hand writing, especially when a statute authorizes

8. Books are evidence of the items, e. g. sale and delivery of goods, services done, materials found, and retainer to do the service, together with the prices carried out respectively. The book, like a confession, is to be taken altogether, with its charges and credits.

SECTION V.

OF THE INCOMPETENCY OF WITNESSES.

This arises, 1st. from want of understanding; 2d. from defect of religious principle; 3d. from infamy of character; 4th. from interest; 5th. from the relation of attorney, solicitor, or counsel and client; also that of physician, surgeon and patient, &c. This question of *competency*, belongs exclusively to the justice; as the question of *credibility* does to the jury, (or justice sitting in their stead) after the witness is sworn. If the witness be *incompetent*, he cannot be sworn; if he be *incredible*, he is not to be believed when sworn.

1. Persons insane, idiots and lunatics, under the influence of their malady, are incompetent, though, if they enjoy lucid intervals, they may testify during such intervals, if they appear to have sufficient reason. Even a person born deaf and dumb, may, if he appear to have sufficient understanding, give evidence through an interpreter by signs. Though, if he can write, this is the more certain mode. A person in a state of intoxication is incompetent; and the justice may determine the question of his competency by inspection.(a)

Children, who do not understand the moral obligation of an oath, cannot be examined. But if they do understand such obligation, they may be sworn at any age, over four years. If capable of distinguishing between good and evil, they may generally be sworn; and if the child appear to have good sense, but not to understand his duty when sworn, he may be instructed by the justice, or some judicious person appointed by him. This may be done on the spot, and in the mean time, the trial may

the taking of his deposition, as it does now in a justice's court. Ante, 868. Moore v. Andrews, 5 Porter's Alabama R. 107. See also Wilbur v. Selden, 6 Cowen, 162, and per Cowen, J. in Merrill v. The Ithaca and Owego Rail Road Co. 16 Wen. 595.

(a) 1 Phil. Ev. 18, 19, and Notes by Cowen & Hill, 60, 61.

be suspended.(b) Though in one case, where the child manifested a total want of all religious instruction, Patterson, J. held that mere instruction by a clergyman, for the purpose of rendering her competent, would not have that effect.(c)

Witnesses may be examined as to the competency of a lunatic, &c. though the usual and most satisfactory mode is, by the inspection and examination of the witness himself.(d) The latter is the true course in testing the capacity of infants. The party objecting may insist on this; and it is no answer that the justice has before examined the witness privately, and so is satisfied of his capacity.(e)

2. Every person who believes in the existence of a Supreme Being who will punish false swearing, may be sworn as a witness, although he do not believe in the truth of the gospels. Thus, a *Jew, Mahometan, Gentoo*, and infidel of any country, may be witnesses. But atheists, and such infidels as profess not any religion, natural or revealed, that can bind their consciences to speak the truth, are excluded from being witnesses.

If an adult has recently and deliberately declared such defect in his belief, this will exclude him, though it is competent to show that he has conscientiously changed such belief, and thereby restore his competency. But he cannot be called upon at the trial to recant his former opinion, or deny the declarations proved against him; nor is he at all to be questioned as to his religious creed, when he is objected to as an infidel. A universalist, who believes that moral punishment for sin is confined to this world, is clearly admissible.(f)

Witnesses are sworn in a justice's court, in substance as directed by 2 R. S. 174, § 108.

The usual form is by laying the hand on and kissing the gospels. And any one who shall desire, may be sworn thus: "You do swear in the presence of the ever living God," holding or not holding up his hand as he pleases; or if he have conscientious scruples against taking an oath, he may make his affirmation thus: "You do solemnly, sincerely and truly declare and affirm;" and if he believe in any other than the christian religion, he shall be sworn according to the peculiar ceremonies of his own religion, if there be any such.(g) Any form elected by the wit-

(b) 1 Phil. Ev. 19, and Notes by Cowen & Hill, 61.

(c) Cowen & Hill's Notes to Phil. Ev. 1502.

(d) 10 John. 362. 16 John. 143.

(e) 2 R. S. 329, § 109. People v. McNair, 21 Wen. 608.

(f) Vid. 2 R. S. 329, § 106, 7, 8. 1 Phil. Ev. 21, 2, and Notes by Cowen & Hill, 62 and 1502, 3. People v. McGarren, 17 Wen. 460.

(g) 2 R. S. 328, 9, § 102 to 106, inclusive.

ness is binding, whether it in fact accord with his conscience or not; and if he swear false he is indictable for perjury.(h)

The mode, in which the witness is sworn, is to be gathered from him on his own suggestion, or on his examination before swearing him.

3. When a man is sentenced for a felony, he is incompetent; but not by reason of sentence for any other crime.(i) A pardon restores his competency, unless the conviction were for perjury or subornation of perjury.(j) The definition of felony is, any offence punishable by death, or by imprisonment in the state prison.(k)

4. The head of interest is the most extensive in its operation to exclude witnesses, and the most difficult perhaps of any in the whole doctrine of evidence. The true rule is, *that when a witness is interested in the event of the suit, to swear in favor of the party who calls him, he is incompetent*: that is to say, if the witness is called to swear a verdict or judgment into existence, which would be evidence for him, or to swear down a verdict or judgment which would be evidence against him, in any future action to be brought, or which might be brought, for or against him, or, if he will directly gain or lose by the event of the suit, he is an incompetent witness; otherwise not.(1) These are always the true and only points of inquiry.

It is no objection to the competency of a witness, that he may feel a strong bias upon his mind, from being a relation of the party, however near; nor is it an objection, that he has an interest in the question, that is, having, or being likely to have a suit turning on the same point with the one in which he is sworn; or expecting some benefit from the result of the trial; or by standing in the same situation with the party, being a joint trespasser or wrongdoer, and therefore liable; or even subjected to a separate action for the same wrong; or, that he has a like demand with the party calling him against the defendant, for wages or other thing; or is separately liable on the same contract; or that it is likely the verdict in the cause in which he testifies, may reach the ears of another court or jury, and influence their decision. Thus the man who borrowed the money, may be a witness in an action *qui tam*, for the usury, whether he has repaid the money or not. So a witness is competent to prove acts which he has done under a bare authority, although he may feel an interest to make them seem regular. Indeed no servants,

(h) Cowen & Hill's Notes to Phil Ev. 705.

(i) 2 R. S. 586, § 23.

(j) Id. and Vid. 2 R. S. 567, 8, § 1. sub. 3, and § 4.

(k) Id. 587, § 30.

(1) 1 Phil. Ev. 56, 63.

agents, attorneys, guardians or other trustees, are incompetent witnesses, as to the subject of their trust or agency, merely on the ground that they may possibly be liable to an action for what they have done.

In all these, and other cases, the mere circumstance that the witness thinks himself interested, ought not to exclude him ; but the justice should inquire into the nature of the interest, and unless he finds it to be such as the law recognizes, whatever the opinion of the witness may be, he should be sworn, and his situation be left to be taken into account, in estimating his credibility. Even an honorary obligation will not disqualify a witness. ^(l) A witness conceiving himself to be interested, or the contrary, if the fact be not as he supposes, will have no effect one way or the other on the question of his competency. ^(m)

Having noticed the cases where the rule of exclusion does not apply, let us take the cases where the verdict or judgment in favor of the party calling the witness, may be used in an action afterwards brought by or against him, either to establish some claim in his favor, or to defeat some claim against him.

1. Where it would be evidence for him. The case usually put to illustrate this part of the rule, is, where all the inhabitants of such a town, village, island or other particular place, claim a customary right of common, either for the pasture of their cattle, or of fishing, &c. in a certain place, which is to be proved by immemorial usage. In such case, a verdict and judgment for one of the inhabitants, who claim this common right, in a suit where such right is in question, would be evidence to support the custom in favor of another. Now suppose one of the inhabitants is sued in trespass, for availing himself of this right of common, and he pleads the prescription as a justification, none of his co-claimants could be witnesses to sustain the plea. But this is not because his feelings may be friendly to a support of the plea, nor because he stands in the place of the defendant, and has an interest in the question, but because the verdict and judgment in favor of the defendant, would, in an action against the witness, for the exercise of the same right, at the suit of the same plaintiff, be evidence of the custom. This question, to be sure, concerning a prescriptive right to a common, which is real estate, could not be decided by a justice's court, but it is, nevertheless, a very good example, to show the meaning, and aid in applying the rule. ⁽ⁿ⁾ In an action by the witness for an injury done to his right of common, the verdict or judgment would be evidence in his favor.

^(l) 1 Phil. Ev. 45 to 54, and Notes by Cowen & Hill.

^(m) Cowen & Hill's Notes to Phil. Ev. 98,9.

⁽ⁿ⁾ Vid. 1 Phil. Ev. 57, and Notes by Cowen & Hill, p. 103,9.

2. Where the verdict or judgment would be evidence against the witness.

This might be, where he has agreed to indemnify the party calling him, against the event of the suit ; or where he has warranted the title of the defendant, who is sued in an action of trover, brought to try the title to property sold to him by the witness, who is called for the defendant.(o) So if the action be against the defendant, for negligence committed by the witness, as the defendant's servant, he can not be sworn to disprove the negligence.(p) And there are many cases of a like interest.

3. A witness is incompetent, though a recovery against the party calling him, would merely subject the witness to costs.(q) Thus, in a suit brought by a warrant or short summons, on giving security, the man who became such, cannot be received as a witness for the plaintiff. And so of any like case, where a recovery against the party calling the witness, would be evidence against the latter, in an action for the costs, or in any way eventually subject him to costs. The reason is of course stronger against his being a witness, in favor of one for whom he has become security to the full amount of the recovery ; yet we shall see hereafter, that when he has a clear and sure remedy for indemnity against a principal, who is perfectly responsible, that might counterbalance his interest, and make him competent.

But independently of the future influence of the verdict or judgment as evidence, the witness is often interested in the event. The party who calls him may be suing or defending as the mere trustee of the witness. Thus the witness is one of the next of kin to A. B., deceased, whose administrator sues for a debt. The witness is not competent ; for a recovery by the administrator, would add to a fund, a part of which would be distributed to the witness. So a constable is sued for taking A's goods, in execution to satisfy the witness' debt, his testimony for the constable, would tend to save the avails of the goods for the discharge of the witness' own debt.(h) So the defendant is sued alone for a debt alleged to be due by him jointly, with the witness, and goes to an issue. The witness is not competent for the plaintiff, because his testimony would tend to charge the defendant with one half the debt, which the witness might otherwise himself be liable to pay. And the case would be entirely

(o) Cowen & Hill's notes to Phil. Ev. 124, 1532.

(p) 1 Phil. Ev. 56, and Cowen & Hill's notes 106, 7, 256, 1625, 6, 1530, 1. where many cases are cited illus-

trating this position.

(q) 1 Phil. Ev. 58, 9.

(h) 1 Phil. Ev. 63, 4, and notes by Cowen & Hill, 114.

clear, if the witness were adduced to fix a debt on the defendant, the whole of which would otherwise fall on the witness.(i) It is a general rule that if the effect of a witness, testimony will be to create or increase a fund in which he would be entitled to participate, or prevent the diminution of such a fund, he is incompetent.(j)

Whenever the husband is incompetent by reason of interest, the wife is also incompetent.(k)

If the interest of the witness to testify in favor of the party calling him, be direct, he is incompetent, however small the interest may be.(l)

But a witness is often equally interested on both sides. Thus, in an action by the endorsee against an endorser of a note made by the witness, he is competent for either party, because he must pay it to one or the other.(m)

It is of course no objection that a witness is interested, to testify against the party calling him.

The interest may be equal or neutralized in various ways. Take, for instance, a suit by the endorsee of a note against the maker. It has for some time been supposed, and so held by many American courts, that the plaintiff could not call the endorser, because a recovery by the plaintiff would or might discharge the witness. Yet it might not. The endorser might still have the note to pay; but it would then become his again, and he could recover over against the maker. Thus being capable of reimbursing himself, the tendency of late American decisions is to hold him competent. The English books have long held him a competent witness for either plaintiff or defendant; and the American cases have always held him competent for the latter. The reason of this is that he is rather interested to testify against the defendant.(n)

It is now very well settled, that when a witness, who is offered for a party, may be liable, on the party's failing; but yet has the means of a clear remedy over against another, he is competent. Thus, you become surety in a bond with the plaintiff in an attachment suit, on A.'s agreeing to save you harmless. If A. be considered a responsible man, you are a witness for the plaintiff, because though you may be sued on his failing in the attachment suit, you cannot probably suffer in the end.(o) Indeed, the plaintiff himself being a perfectly responsible man, it may be

(i) Vid. The late case of *Collins v Ellis*, 21 Wend. 397.

(j) Cowen & Hill's notes to Phil. Ev. 114.

(k) 1 Phil. Ev. 65, and Cowen & Hill's Notes, 125.

(l) Id. 65, and Notes.

(m) 1 Phil. Ev. 66, 67, and Cowen & Hill's Notes, 131, 2.

(n) Cowen & Hill's Notes to Phil. Ev. 131, 2, 1545, 6.

(o) Id. 130, 1.

doubted, under the strong inclination of the courts in favor of competency, whether this would not be sufficient to balance the interest ; for he, of course, is bound to indemnify his bail. (*p*)

SECTION VI.

OF OBJECTING TO AND PROVING THE INCOMPETENCY OF AN INTERESTED WITNESS. OF THE INCOMPETENCY OF A PARTY TO THE SUIT, AND THE WIFE OF A PARTY. OF RESTORING THE COMPETENCY OF INTERESTED WITNESSES.

The objection to a witness on the ground of interest, is either preliminary, i. e. made before he is sworn in chief, or after he is so sworn ; or the objection is made both before and after he is so sworn.

The objection must, in each case, be proved by the party who raises it ; for the presumption is in favor of the witness' competency till the contrary appear, either by the statement of the party offering him, or in some other way. (*q*) And being once shown, it must be clearly removed, in order to render him admissible. (*r*) The question, like all others, as to the admissibility of evidence, must be decided by the court ; and the evidence on the point cannot be submitted to the jury. (*s*) The court is the trier ; nor will his decision be reversed merely because he happens to decide against the weight of evidence. (*t*)

The more direct, clear and safe mode of raising the point, especially in a justice's court, is by objecting to the offered witness before he is sworn in chief. This makes a distinct collateral issue, determinable by the justice alone, whether there be a jury or not, on evidence receiveable under a peculiar form of oath, called the *voir dire*, and under rules peculiar to itself. Upon this issue, the state of the pleadings and the evidence and statements of the opposite party in court, so far as they have already appeared in the cause, and are relevant to the question, may be considered. *Wandless v. Cawthorne*, Mood. & Malk. 321, note. *Perryman v. Steggall*, 5 Carr. & Payne, 197. *Hartshorne v. Watson*, 5 Bing. N. C. 477. *Bunter v. Warre*, 1 Barn. & Cress. 689.

It has been said in the older English cases, that when you swear a

(*p*) Id. 1543, 4.
 (*q*) Id. 58, 256, 477, 1501.
 (*r*) Id. 1501.

(*s*) Id. 58.
 (*t*) Id. 1501.

witness on his *voire dire*, and he denies his interest, you have made your election, and cannot contradict him by other evidence. 10 Mod. 193, said by Parker, C. J. But Mr. Starkie, an approved writer on evidence, says this would be manifestly unjust, 1 Stark. Ev. Am. ed. of 1837, p. 123, note (e) ; and Phillipps, 1 vol. 131, 2, Cowen & Hill's ed. says the modern and more convenient practice is, that he may be contradicted. In the 8th edition of that work, 149, it is said, "If the fact of interest is satisfactorily proved by other evidence, the witness will be rejected, though he may have ventured to deny it on his *voire dire*." The cases already cited certainly assume that other evidence beside that derived from the witness' mere *voire dire*, may be considered in connection with it. And I am not aware of any case in this state holding the contrary, except the *nisi prius* decision of Van Ness, J. in *Welden v. Buck*, Anth. N. P. R. 9. Cases in the neighboring states are pretty uniform, that a resort to the *voire dire* precludes other evidence, and that a resort to the latter precludes the former, while the modern practice of Westminster Hall appears to let in both, on the collateral issue. Indeed, a very great freedom of raising this issue, and inquiring of interest under it, seems to be allowed there by the cases. Those just now cited from 1 Barn. & Cress. 5 Carr. & Payne, and 5 Bing. N. C. hold that the party whose witness appears, on other proof, to be interested, may himself call the witness in question, and have him sworn on the *voire dire*, in order to contradict the appearances against him, explain away his apparent interest, or show that it has been discharged or removed. And no limitation to evidence on this issue, deriveable from the witness' mere oath, seems to be settled. No such limitation is prescribed by the English books of practice, or appears to exist in the nature of things. Roscoe, Civ. Ev. p. 80, Am. ed. of 1832, says: "The party objecting may examine the witness on the *voire dire*, and also, if necessary, call another witness to prove his incompetency."

In *Hartshorne v. Watson*, Coltman, J. said, "The privilege of examining on the *voire dire* is not confined to one party ; and if the defendant, (the objector,) omit to examine on the *voire dire*, a witness who is *prima facie* interested, the plaintiff (the party against whom the objection was taken,) is not therefore precluded from showing by his own examination of the witness that he is not interested. It is not a right dependent on the exercise of a precedent right ; but equal to both parties to enter on this collateral issue." Such was the case of *Perryman v. Steggall*. The great advantage of this issue is, that it supersedes all the rules concerning primary and secondary evidence. Either party may examine to the

existence of instruments in writing, private or public, as well as all other particulars bearing on the point in question; and this, whether they go to establish, repel or remove the interest. The instrument need not be produced, nor, if attested, proved by a subscribing witness.^(u)

In *Perryman v. Steggall*, the defendant's counsel, admitting on his opening, that the witness was liable over to the defendant, was allowed to call the witness, and, on his *voire dire*, show by parol, that his interest had been removed in virtue of an insolvent discharge. In another case a witness, on her *voire dire*, stated she was the wife of the party calling her; but she was allowed to remove her interest by testifying orally to a decree of divorce *a vinculo*, though it was objected that the record should be produced. *Wells v. Fletcher*, 5 Carr. & Payne, 12. Indeed a witness may be so sworn to remove an interest apparent on the very record in the cause. *Carlisle v. Eady*, 1 Carr. & Payne, 234.

Several American cases tend strongly to favor the idea, that the party objecting and calling for the *voire dire*, and failing on that, may at once make out his case by other evidence, and so shut out the witness. *Shannon v. Commonwealth*, 8 Serg. & Rawle, 444. *Galbraith v. Galbraith*, 6 Watts, 112. *Parker, J. in Hamblett v. Hamblett*, 6 N. H. R. 351. And in *Butler v. Tufts*, 1 Shepl. 302, 306, where the plaintiff first attempted to prove a witness to be interested by other evidence, and failed, and then proposed to put the witness on his *voire dire*, the court said they thought this might have been allowed in the discretion of the judge. Indeed, if, as is settled, the party offering the witness may call him to do away the assailing testimony, with what propriety could he object to the witness being called by his antagonist? If evidence of both kinds be admissible on the preliminary issue in a certain shape and to a certain extent, as it clearly is, what reason exists for excluding either party from any sort of evidence pertinent to the question?

FORM OF THE VOIRE DIRE.

You do swear that you will true answer make to such questions as shall be put to you touching your interest in the event of this cause.

If administered to a witness other than the one offered, say, *Touching A. B.'s (the witness' name) interest, &c.*

It will have been seen that the great advantage of the collateral issue to either party, arises from the latitudinary mode of examination which

^(u) See 1 Phil. Ev. 132, and Cowen & Hill's Notes, 260, 708, 9, 10, 1557.

the law allows. The object is to prevent one party being surprized by an interested witness, and the other from being surprized by an objection which may have no foundation in reality. This may often occur in consequence of the question springing up out of the regular march of the cause. Another purpose of the objector may be to prevent the interested testimony from mingling with the merits, and thus, perhaps, working an improper influence.

Beyond these objects, according to the approved English books of evidence, very little benefit can be derived; for, according to such books, though you fail on the collateral issue to show the alleged interest, you may still raise the objection, after the witness shall have been sworn in chief, on the ground of objection becoming apparent, at any time before the testimony may be closed. The right seems to extend throughout the trial. At least the English books seem to fix no limit to it, till all the proofs are closed. 1 Phil. Ev. 132, Cowen & Hill's ed. 8th Lond. ed. 149. 1 Stark. Ev. 123, note (e) Am. ed. of 1837. Several American cases are to the same effect. *Evans v. Eaton*, 1 Pet. C. C. R. 338. *Schillinger v. McCann*, 6 Greenl. 364. *Hamblett v. Hamblett*, 6 N. H. R. 351.

The books and cases are still more clear, at least in New-York and the neighboring states, that you may, in your election, omit the preliminary objection, and stake the exclusion of the witness on such testimony as you can obtain under the ordinary rules, on general examinations, in the course of the trial. In such case, too, it is said you may object at any time before the testimony is closed; and this course is even recommended by Mr. Phillipps, inasmuch as the preliminary examination must generally be to the same effect as that in chief. 1 Phil. Ev. 267, and the cases there cited. *Bank of North America v. Wyckoff*, 4 Dall. 151. *Parker, J. in Hamblett v. Hamblett*, 6 N. H. R. 346, and the cases there cited. Said to be the rule by Nelson, J. in *Tallman v. Dutcher*, 7 Wen. 180, 1. Here all the rules as to primary and secondary evidence apply; and it is said that, if the interest of the witness be shown independently of his own testimony, he cannot be examined to remove it; *Mott v. Hicks*, 1 Cowen, 513; *Evans v. Gray*, 1 Mart. Lou. R. N. S. 79; though other witnesses may be. *Id. id.* However, if his interest appear by his own examination, he may be cross-examined to facts which show it not to exist, or to prove that it has been removed. And in such case he may be treated exactly as if under his *voire dire*, except that the rules of primary and secondary evidence cannot be dispensed with. *Grills v. Davies*, 2 Barn. & Adolph. 129. *M'Micken v. Fair*, 6 Mart. Lou. R. N. S. 515. That the best evidence must be given in such case. See

Cowen & Hill's Notes to Phil. Ev. 260, and the cases there cited. It follows, that, after the witness is thus sworn generally in the cause, the *voire dire proper* cannot be resorted to by either party. His interest may still be removed, e. g. by showing a release ; but this must be produced, or its absence accounted for. Jackson, ex dem. Montresor, v. Rice, 3 Wen. 180. Tallman v. Dutcher, 7 Wen. 180.

An important distinction seems to be now well established in England, by adjudged cases in all their courts of law, which I do not find mentioned in their books of evidence, nor does it derive much countenance, if any, from the American cases. It is this, that you *must* make your objection of interest before the witness is sworn, or you lose the chance of making it on the trial. This was held by the K. B., A. D. 1823, in Bunter v. Warre, 1 Barn. & Cress. 689 ; by the C. P. A. D. 1839, in Hartshorne v. Walton, 5 Bing. N. C. 477 ; and by the Exch. A. D. 1839, in Dewdenay v. Palmer, of which case the only report I have seen is in 1 Jurist, Am. ed. 151. These cases go on the notion that, by omitting this early challenge, you deprive the opposite party of the advantage which he might derive from the *voire dire* ; and therefore cannot avail yourself, on the trial, of any objection to the *competency*, however that may be as to the *credibility* of the witness. The doctrine was strongly asserted in all three of these cases ; and in the first two, though the witness' incompetency was shown on the trial by evidence other than his own, he was, as a consequence, himself examined to explain it away ; and did do so. The last case was stronger ; for, in consequence of the omission, the court refused to hear the objection at all, on its being afterwards raised in the course of the trial. Hartshorne v. Walton was decided on the authority of Bunter v. Warre, which last was long before the later editions of Starkie and Phillipps ; yet neither they nor Roscoe seem to have noticed the case as an authority for the distinction. It has not, that I am aware, been recognized by any adjudged case in this country. The rule, as laid down by Peake, (Norris' Peake, 262,) is directly the contrary ; and it is presumed that he has generally been followed in the United States. The doctrine on this whole subject seems to have fluctuated unaccountably. Perhaps the safest side, for the present, lies in those rules which allow the widest latitude of enquiry ; and do not restrict the party by his election or omission of any particular mode of enquiry.

What a witness has been heard to say, is not admissible to prove him incompetent. Otherwise of declarations made by the party calling him.(v)

(v) Cowen & Hill's Notes to Phil. Ev. 268, 707, 1559.

The parties to the suit on trial, whether real or nominal, and whether interested or not, are, in New-York, disallowed as witnesses on either side, unless by consent of all parties concerned in the cause. Even if one of two joint parties, be willing to testify against the other, he is not received as competent without the other's consent.(w)

This exclusion applies to the party only as a general witness in the cause; not where, as ante, 639, 40, he is adduced to lay the foundation for secondary evidence. And he may be of course, and is, in some cases, made competent by statute.

One defendant among several suffering a default, or confessing the cause of action, does not render him competent.(x)

The wife can never be a witness for or against her husband, when he is a party.(y)

If a plaintiff join several defendants in an action for a wrong, against any part of whom he gives no evidence, the justice may acquit them; or the jury, if there be one, may do so, under his direction, at any stage of the cause, after the plaintiff shall have closed his evidence; and they are then admissible as witnesses for their late co-defendants.(z) So, if process issue against several, but is served on part only of the defendants, the others are witnesses.(a)

These remarks, however, have no application to actions on contract, though it appear that one of the defendants is clearly entitled to be acquitted; as by reason of insolvency, infancy, or other cause merely personal to himself.(b)

The justice may, on the plaintiff's motion, discharge one of several defendants in an action for a wrong, who is thus rendered a competent witness for either party.(c)

There are also various other modes of removing the incompetency of witnesses. Thus, whatever interest a witness may have had, if he is divested of it by release, payment, or any other means, when he is ready to be sworn, there is then no objection to his competency. And there are but few cases in which the interest of a witness cannot be thus discharged. A release will operate upon every present right, though it be to take effect in future. After being released, the witness is exactly in the situation of any other witness in the cause, and may be examined to every point

(w) Cowen & Hill's Notes to Phil. Ev. 135, 136, 139, 142, 163.

(x) Cowen & Hill's Notes to Phil. Ev. 147, 1553.

(y) 1 Phil. Ev. 76, 7.

(z) Id. 73, and Cowen & Hill's Notes, 142. 18 Wend. 142, 3.

(a) Cowen & Hill's Notes to Phil. Ev. 144.

(b) Id. 144.

(c) 1 Phil. Ev. 76.

arising on the trial. In cases where the proceeding would be evidence to support some claim of the witness, he can release such claim to the party, either with or without receiving his pay. When it will be evidence against him, and in favor of the party calling him, the party may release him; and where the party or the witness, having a right thus to release or discharge an interest, do all in their power to get rid of it, as by tendering a release, or tendering money in discharge of the interest, &c., which is refused, it is the same, in effect, as if the release, money, &c. had been accepted.(d)

If the interest of the witness arise by his own act, or otherwise, without the consent of the party calling him, and after the fact to be proved had happened, he is still a competent witness, and cannot thus deprive the party of his testimony. Thus, should a witness make a bet in favor of the party's winning the cause, this shall not exclude him, however it may affect his credibility.(e) If the objection to the witness be, that he is bail, guardian or *prochein ami*, the justice is bound to discharge him on motion, and substitute any other proper person who is offered.(f)

Form of a release from a party to a witness, in order to restore his competency.

JUSTICES' COURT.

James Jackson }
v. } Before Ransom Cook, Esq.
John Styles. }

For value received, I do hereby release *Jacob Thomas*, a witness offered (or to be offered,) by me, on the trial of this cause, of and from any claim or demand which I now or may hereafter have against him, by reason of the determination of this suit, or any matter, either directly or indirectly brought, or to be brought in question, in the same suit, either for or against me. And I do farther release him from all demands connected with or depending upon the subject matter of this suit, or any part thereof, which I now or may hereafter have against him. Witness my hand and seal, the 10th day of September, A. D. 1840.

JAMES JACKSON. [L. s.]

Sealed and delivered in }
presence of T. N. }

If signed, &c. by an attorney, under a power for this purpose, add to the signature these words, "*By E. F. his attorney.*"

(d) 1 Phil. Ev. 133. Cowen & Hill's Notes, 261 to 264, 267, 8, 1537, 1559.

(e) 1 Phil. Ev. 137. Cowen & Hill's Notes, 272, 740, 1, 1570, 1.

(f) 8 John. 407.

When the claim to be released is in favor of more than one, jointly, a release from one is a release from all.(g)

Form of a release from a witness to the party.

JUSTICES' COURT.

James Jackson }
v. } Before Ransom Cook, Esq.
John Stiles. }

For value received, I do hereby release *James Jackson*, plaintiff in the above cause, of and from any claim or demand which I now or may hereafter have against him, by reason of the determination of this suit, or any matter, either directly or indirectly brought, or to be brought in question, in the same suit, either for or against him. And I do farther release him from all demands connected with or depending upon the subject matter of this suit, or any part thereof, which I now or may hereafter have against him. Witness, &c.

A release from a plaintiff to a witness, of all demands against the witness, excepting such for which the witness is liable with the defendant in the suit, renders him a competent witness for the plaintiff.(h)

If, by mistake, the witness be not released before he is sworn and examined, he may still be released, but must be re-examined.(i)

5. Of communications between attorney, &c., and client, physician, &c., and patient, &c.

The communications of a client to his attorney, solicitor or counsel, are held inviolable in courts of justice, and can never be disclosed in evidence, either in the cause in which they are made, or in any other cause, even between third persons, though after the relation of attorney, &c. and client has ceased to exist. In a word, the mouth of the attorney, solicitor or counsel is shut forever, on this head, nor can they be compelled to produce papers which have been committed to them as professional men. But communications thus sacred, are those only which are made during the relation of which we are speaking, and not those made to a professional man, who is not retained in the business to which they relate, however confidential they may be. This is the privilege of the party or the client, and he alone can waive it. At common law, it was

(g) Ante, 772.

(h) 14 John. 387.

(i) Cowen & Hill's Notes to Phil. Ev.

261, 709, 1561. Tallman v. Dutcher, 7 Wend. 180.

confined to persons of the legal profession, and did not extend to medical men, clergymen and others, who were compellable to testify to whatever they learned in the course of their professions, with whatever obligations of confidence and secrecy their information might have been attended. But now, by statute, physicians, surgeons and clergymen are put on the same footing with counsellors and attorneys. These are bound to testify as to facts which they learned before being addressed in their professional character, or after their duties as such have ceased ; as if an attorney had been a subscribing witness, or was knowing to an erasure in a deed, which comes in question, in a cause in which he is afterwards retained ; or the client voluntarily communicate facts after the attorney is through with the business, and his functions have ceased. An attorney has also been examined as to the question, whether a note put into his hands was endorsed or not ; and he may be compelled to swear to the existence of a paper, and that it is in his hands, so as to let in inferior proof of its contents, if it be not produced on notice from the opposite party ; or to show that it is in court, to let in such inferior proof, upon a short notice, given upon the trial, to produce it. The rule also prohibits a clerk or student at law from being a witness to facts which he learned while in the office of the attorney with whom he is pursuing his professional studies. The rule also extends to the agent of an attorney, and an interpreter between him and his client. The whole current of decisions appears to confine this privilege strictly to the relation between men of the legal profession and their clients ; and it would seem clear that a man employed in conducting a suit before a justice or elsewhere, who has no regular license to practice in any of our courts of record, and not acting as a regular clerk or student of one having such license, is bound to disclose, under oath, the communications of his employer.(j)

A physician consulted as to the means of doing an unlawful act, e. g. of procuring an abortion, is not excused by the statute from answering.(k)

(j) Vid. 1 Phil. Ev. 140 to 147, and Cowen & Hill's Notes, 275 to 283, 1571 to 1574.

(k) Hewitt v. Prime, 21 Wen. 79.

SECTION VII.

OF THE EXAMINATION OF WITNESSES.

The form of the general oath is given by the statute, 2 R. S. 174, § 108. And when a witness is ignorant of the English language, he must be sworn and examined, through an interpreter, who must be first sworn.

Form of the interpreter's oath.

You do swear that you will truly interpret between the court, the jury, and the witness, A. B., in this cause, between C., plaintiff, and D., defendant.

Omit the words "*the jury*," if the justice sit alone. The oath is then administered, and interpreted by the sworn interpreter, and the questions put, and answers received, are also interpreted in the same way.

This course is also necessary, where a deaf and dumb person is to testify by signs; and where a witness can understand what is said, but talks so very indistinctly as not to be understood, except by some familiar acquaintance, an interpreter must also be sworn in the same form, in order to expound the answers.⁽¹⁾ Witnesses may, in the discretion of the justice, be examined separately, those not on examination being directed to withdraw. This is sometimes advisable; and if a witness ordered to withdraw, wilfully disobey, or return without proper cause, he may be rejected as incompetent. This rule ought not however to be applied, where the witness is an agent or advocate engaged in conducting the suit. Indeed the rejection or not, is mere matter of discretion; and unless the return of the witness, present a gross case of wilful disobedience, he should be received.^(m)

When the witness has been regularly sworn, he is first to be examined by the party calling him, which is called an examination *in chief*, after which, the other party is at liberty to *cross-examine* him, when the party who called, may *re-examine*, and so on alternately till the questions are exhausted. The examination is in open court, in presence of the parties and their counsel, the justice and jury, (if there be one,) who have thus

(1) Vid. Cowen & Hill's Notes to Phil. Ev. 706, 718.

(m) 1 Phil. Ev. 268, and Cowen & Hill's Notes, 720, et seq.

an opportunity of observing the understanding, demeanor and inclination of the witnesses.(n)

Leading questions, that is, such as instruct a witness how to answer on material points, are not allowed, in general, on an examination in chief; for, to direct witnesses, in their evidence, would only serve to strengthen that bias, which they are usually too much disposed to feel, in favor of the party who calls them. Thus: *Did you see the defendant driving away the plaintiff's cow? Was this on the 5th of May? Is that cow worth \$25? Did the defendant say he owed the plaintiff 50 dollars, or how much did he say?* And other questions containing in themselves, the place, quantity, time, kind, price, or other thing sought for in proof, are leading questions, which ought never, without substantial reason, to be put to a witness. If, however, the justice finds on pursuing the examination, that the witness is backward or reluctant in the answers he gives, and is, in a word, what is called an unwilling witness, he may then suffer the party to change his ground, and put leading questions, and, indeed allow all the latitude of a cross-examination. And, in examining a witness to contradict directly some particular stated by the witness on the other side, a leading question may be put, on examination in chief.(o)

A witness cannot be compelled, (though he may do this if he pleases,) to answer any question, which will expose or tend to expose him, to a charge legally criminal, though the consequence might be only a pecuniary penalty: and if the court see, that by any possibility, the answer may form the least link in the chain of proof, to convict a witness of a criminal offence, it will not compel him to answer. This, however, is the privilege of the witness only, and he may waive it, and answer the question. A very striking illustration of this rule is given in *Cates v. Hardacre*, 3 Taunt. 444. It was an action by the *endorsee* against the *drawer* of a bill of exchange, in which the defence was usury: and one *Taylor*, who appeared to be wholly disconnected with the bill, was introduced to prove the defence, and asked by the defendant's counsel, *if the bill had ever been in his possession before?* But the witness said, *he thought the question would have a tendency to convict him of usury*, and he was excused the answer upon the ground, that the questions went to connect the witness with the bill, *and they might form links in a chain.* "When a question is propounded, it belongs to the court to consider and decide, whether any direct answer to it *can* implicate the witness. If this be decided in the negative, then he may answer it, without violating the

(n) 1 Phil. Ev. 268.

(o) Id. 268, 9, 271.

privilege which is secured to him by law. If a direct answer to it, *may* criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer, without knowing what it would be ; and a disclosure of that fact to the judges, would strip him of the privilege which the law allows, and which he claims.”(p)

The exemption does not extend to a question, the answer to which may degrade the witness' moral character merely, and not subject him to any *legal penalty*. Questions of the latter description, therefore, he is bound to answer, provided they be relevant to the matter in issue ; however doubtful this may be, when the question is merely collateral, i. e. affecting his credit or competency.(q) Nor can the witness decline answering, merely because the answer may subject him to a civil suit, unless he be a party in interest.(r)

A witness can depose to such facts only, as are within his own recollection ; but to assist his memory, he may use a written entry or memorandum, or the copy of a memorandum. And if the paper bring the fact to his recollection, such evidence will be sufficient. But if he cannot, from recollection, speak to the fact, except from finding it on the paper, his testimony goes for nothing. There is no need that the fact should be noted at the precise time it happened, for the witness must swear to his recollection, and it is not very material how it was brought into his mind. However, the entry should either have been made by the witness, or by another and examined by him, while he remembered the fact noted. Any paper whatever, may be shown to him, to enable him to correct a mistake. These remarks must be taken with the qualification that, if the paper be an original entry or memorandum made by the witness, at or about the time, for the purpose of preserving the memory of the transaction, and the witness will testify that he believes it to be correct though he has forgotten the transaction itself, the paper may then be read as evidence.(s)

In general, the opinion of a witness is not evidence : he must speak to facts. But in questions of science or trade, or which relate to any profession or calling ; persons of skill may give their opinions in evidence. Thus, physicians, surgeons, ship-builders, carpenters and engineers, have been allowed to give their opinions on subjects connected with their pro-

(p) Per Marshall, C. J. in 1 Burr's Trial, by Rob. 244. 1 Phil. Ev. 276. Cowen & Hill's Notes, 734 to 738, 745, 747.

(q) 1 Phil. Ev. 278, 9, and Cowen & Hill's Notes 738, and 742 to 744, 745 to 747.

(r) Cowen & Hill's Notes to Phil. Ev. 739 40. 741.

(s) 1 Phil. Ev. 289, explained by Cowen & Hill's Notes, 750 to 759, where a great variety of examples are mentioned.

fessions or callings, and the value of property is every day determined in this manner. Evidence of general character is also founded in opinion. And where a witness cannot recollect a precise conversation of which he is testifying, he may give his impression as to its substance.(t)

In cross examinations, the object of which is, to sift evidence, and try the credibility of witnesses, a great latitude is allowed in the mode of putting questions. Leading questions may be asked, and every thing inquired into, which may, by any possibility, have the least connexion with the points in issue, or any of them. But this rule is still subject to certain limitations. And a witness cannot be examined, as to a fact which must, of necessity, be wholly irrelevant and impertinent, for the mere purpose of contradicting his answer ; nor, if he answer such inquiry, will the party be allowed to call a witness to contradict the answer.(u)

When a witness has once been sworn, and given some evidence, the opposite party may cross examine him. And if a witness have once been examined by the party, the privilege of cross examination continues in every stage of the cause ; so that the other party may call the same witness to prove his case ; and in examining him may ask leading questions. In the case however, which proves the last position, the witness might possibly have shown a strong bias in favor of the party that called him, and on that account, perhaps, a greater scope was granted to the adverse party, than is usually allowed. It may happen on the other hand, that the party calls a witness unwillingly, and from mere necessity, knowing him to be favorable to the other side ; in such a case, to allow the opposite party, on calling him-up afterwards, as his own witness, to put leading questions, would be giving him an unreasonable advantage. On the contrary, it might, perhaps, be proper to invest the party first calling him, with some of the powers of cross-examination, and at the same time, to oblige the other party to treat such witness as strictly his own, and confine him within the limits of an examination in chief. And on a cross examination, the party always makes the witness so far his own, that he cannot examine as to any written evidence which comes out on such cross examination in any other manner, than if the witness had been his own.(v) Ch. J. Tilghman, in 5 Binney, 488, makes the following excellent remarks on the subject of examination : " The party who calls the witness, examines him first ; he is then cross examined, by the opposite party, after which, if necessary, the party who produced

(t) 1 Phil. Ev. 290, Cowen & Hill's Notes, 749, 759 to 763.

(v) 1 Phil. Ev. 273, 4. Cowen & Hill's Notes, 730.

(u) 1 Phil. Ev. 272.3. Cowen & Hill's Notes, 726.

him, may examine him again. The mouth of the witness is not to be closed, because the counsel omitted to ask a material question at first. It may be necessary, in order to come to the truth of the case, to examine him as to new matter, and after that, there may be a second cross examination. The court, in their discretion, may permit a witness to be examined over and over again, at any time during the trial. But they will take care to exercise this discretion so as not to suffer any advantage to be gained by trick or artifice. If the plaintiff should declare that he had finished his testimony, in consequence of which, the defendant should dismiss some of his witnesses, and then the plaintiff should offer to produce new testimony, which might, perhaps, have been contradicted by the witnesses who were dismissed, the court would not suffer him to avail himself of such disingenuous conduct."^(w) And where the plaintiff's witness is in part examined, and the cause is then adjourned to another day, on account of the sickness of the witness, it is the duty of the plaintiff to produce him at the adjourned day, or show good cause for not doing so; otherwise, the justice may reject the evidence; for, if admitted, the defendant would lose the right of cross examination.^(x)

This right of cross-examination is highly prized by the law, and, as we have seen, courts of justice should be liberal and indulgent in its allowance. A very just latitude, in this respect, is suggested by Mr. *Evans*, in his annotations upon *Pothier*, vol. 2, p. 269, which I shall here give: "In the case of *Hunter v. Kehoe*, before the court of King's Bench, in *Ireland*, Mic. 1794, *Ridgeway, &c.* 350, Lord *Clonmell* observed, that cross-examination had gone to an unreasonable length, but he had in general permitted gentlemen to go as far as they pleased, because, if there was an honest case on the other side, it would do them no good." "The benefits of cross-examination, (says the same author,) are sometimes defeated by the interposition of the court, to require an explanation of the motive and object of the question proposed, to pronounce a judgment upon them immediately: whereas experience frequently shows, that it is only by an indirect, and apparently irrelevant inquiry, that a witness can be brought to divulge the truth which he had prepared himself to conceal; the explanation of the motives and tendency of the question, furnishes the witness with a caution that may wholly defeat the object of it, which might have been successfully attained, if the gradual progress, from immateriality to materiality was withheld from his observation. The importance of an inquiry may sometimes be strongly felt

(w) *Ante*, 894, 5, 6.

(x) 12 *John*. 299, *ante*, 896.

by an advocate, and upon very reasonable grounds from his own instructions, with respect to the bearing and circumstances of the cause, which the judge, acting only upon the impressions of what has already been disclosed, cannot, by any possibility, anticipate. The full exposition of the motives, can only be attained by a premature exposition of the case that is to be brought forward, and even when that can be done without prejudice to the party, the endeavor to satisfy the court would have the common effect of an interruption of the regular course of inquiry, and instead of assisting the accurate discussion of the question, would, in all probability, terminate in confused and desultory altercation."

I conclude this head of the examination of witnesses, in the words of C. J. Pennington: "The circumstances of the case, the probable or improbable nature of the facts detailed, the character of the witness, the manner of his giving testimony, must all be taken into consideration, and ought, after being duly weighed, to carry conviction to the mind of the jury, before they give it an effect, by their verdict. It is common for jurymen to say, in excuse for giving a wrong verdict, that they believed it was wrong, but how could they do otherwise. The facts were sworn to, it was the fault of the witness, not theirs. This practice of jurors' loading on the witness their own sins, and making him a scape goat for the whole, is grossly improper. It is true, that jurors cannot, nor ought they to substitute in the place of proof, their own fancies, conjectures, or prepossessions, much less to suffer their passions, inclinations or biasses, to come in aid of proof, but are to govern themselves by the testimony given in the cause. But should a witness relate a fact, which, from its improbable nature, or from the badness of the character of the witness, taken together with other circumstances in the cause, on due consideration, doth not carry a belief of the fact home to the minds of the jury, but on the other hand, they believe that what the witness hath related is false; in that case, what he hath said is no evidence to them, and they are not bound to give any weight to it; but on the contrary, if they act upon it, or rather make up their verdict on it, such conduct is a departure from their duty, and little short of a violation of their oaths.

"After all the evidence is given in a cause, it frequently happens that the mind is in doubt. If the testimony is contradictory, it should be reconciled if possible: if it is not susceptible of reconciliation, it must be weighed by a sound discretion, and determined as one or the other preponderates. If, after all, the mind is balanced, I think it a reasonable rule, (though I do not recollect any where seeing it laid down,) that it must be determined against the party that hath the affirmative side of the question, as having failed to make out what he hath undertaken to do." Vid. Pennington on Small Causes, 162, 3.

SECTION VIII.

OF THE SEVERAL WAYS IN WHICH THE CREDIT OF A WITNESS MAY BE IMPEACHED.

1. To impeach the credit of a witness, the opposite party may disprove the facts stated by him, or may examine other witnesses as to his general character, but they will not be allowed to speak to particular facts, or parts of his conduct; for, though every man is supposed capable of supporting the former, it is not likely that he should be prepared to answer the latter, without notice. The regular mode is to enquire whether they have the means of knowing the witness' general character, and whether from such knowledge they would believe him on his oath. In answer to such evidence against character, the other party may cross-examine the witnesses, as to their means of knowledge, or may attack their general character, and by fresh evidence, support the character of his own witness. The impeaching question may be general, as above stated, or it may be narrowed to the general character for truth and veracity.^(y)

In commenting upon the above rule, Mr. Evans^(z) makes the following remarks: "It is an established rule, that witnesses examined with a view to discredit the testimony of others, cannot be permitted to depose to particular facts of criminality, but can only express their general opinion, whether the party is or is not entitled to be believed on his oath; but the other side, to support the testimony, may inquire what are the reasons of disbelief, which sometimes, as in the case⁽¹⁾ above adverted to, are ridiculous enough. If it is declined to inquire into these reasons, there is pretty considerable ground to presume a consciousness, that the opinion is founded upon adequate motives. I have heard witnesses asked, whether they had ever known the persons against whose veracity they depose, give false evidence in a court of justice: and upon their

(1) The case adverted to by Mr. Evans, is stated in his Pothier, vol. 2, 250, as follows: "A witness swore, that a person examined on the other side, was not fit to be believed upon his oath; and being asked his reason, said, that he had never made a good fence since he came to his farm."

(y) 1 Phil. Ev. 291, 292, 293. Cowen & Hill's Notes, 763 to 767, and 767 to 771. People v. Rector, 19 Wen. 569, 579.

) 2 Evans' Poth. 260.

answering in the negative, it was intimated to the jury, that the testimony to the discredit was absolutely frivolous ; whereas, if the question had been, what were the reasons upon which the discredit was founded, a fraudulent conduct might have been shown, which indicated the want of moral and religious principle, and consequently affected the strongest ground of reliance upon testimony. When witnesses speak to the character of others, not only their own character, but their ability, and opportunity to form an adequate judgment, are circumstances very proper to be taken into consideration."

On this head of evidence, Ch. Justice Pennington says : (1) " It is bot-tomed on the plainest principle that can be imagined ; that is, that one man is not entitled to the same credit with another. Witnesses, there-fore, may be sworn to give the character of a witness, examined in a cause ; it is held, however, that only the general character of a witness shall be inquired into ; and some hold that only the general character of the witness, *in respect of his veracity, when under oath*, is to be inquired of. I never could perceive any substantial reason for this opinion, nor is it adhered to in practice. Suppose a witness is a notorious cheat, sharp-er, and swindler ; although nothing has been particularly alleged against him, on the ground of his veracity under oath, is he to stand, in point of credit, on equal ground with a man of unblemished character, and good standing in society ? Reason revolts at the idea. I take it, that the gen-eral character of the witness, so far as it goes to show turpitude of mind, is in issue, less credit being due to a corrupt mind, than a pure one : but you cannot examine as to particular facts which go to show this cor-ruptness of mind."

2. The credit of a witness may be impeached, by showing that he has made statements out of court, either by parol, by letter, or by deposition, on the same subject, contrary to what he swears on the trial. But he must himself be first interrogated particularly concerning the alleged statement. Then, if effectually impeached, he may be again called to explain why he made it. His former consistent statements cannot, in general, be proved, in order to corroborate his testimony. If the alleged contradiction were in writing, e. g. a letter, the witness cannot be inter-rogated concerning it, unless it be produced, or its absence excused. And the same rule as to the degree of evidence of course applies to its positive introduction as impeaching evidence. The contradiction is con-sidered as a general impeachment of credit ; and beside any proper ex-planations by the witness himself, in reply, you may add evidence of his

(1) Penning. on Small Causes. 158, 9.

good moral character. And if an attesting witness to a deed, impeach its validity, on the ground of fraud, it may be supported by showing the good character of another subscribing witness, who is since dead ; though where two witnesses merely contradict each other as to facts, and no fraud is imputed, evidence of general character is not admissible in support of either.(a)

A party will not be allowed to discredit his own witness, by showing his general character, or any other facts directly impeaching him. But he may contradict him, and show the fact by other witnesses to differ from what he states it, and thus do away the effect of his testimony.(b) And where the party calls an attesting witness, who denies his attestation, or a witness who has inveigled the party by making favorable statements to him, or to his attorney or counsel, in consequence of which he is called, but contradicts on oath what he stated before, he may be impeached by showing such former statement, or his general bad character, or other matter going to reduce his credibility the same as if he had been called by the adverse party.(c)

SECTION IX.

OF THE CONSEQUENCES FROM THE JUSTICE'S ADMITTING IMPROPER EVIDENCE.

The justice should be careful not to suffer any improper evidence to go to the jury, or to receive it himself, when sitting alone, if objected to ; for this will be fatal on certiorari, even though he immediately direct the jury to disregard it, or return that he utterly disregarded it himself.(d) Thus, where the justice was himself sworn by another magistrate ;(e) where he acted on his own private knowledge as evidence ;(f) where in an action for not attending as a witness on a subpœna, he suffered parol evidence that the defendant had confessed being subpœnaed, without the

(a) *People v. Rector*, 18 Wen. 569. 1 Phil. Ev. 293 to 308. Cowen & Hill's Notes, 771 to 779. 8 Carr & Payne, 726.
(b) 1 Phil. Ev. 308 to 311. Cowen & Hill's Notes, 779 to 782. 2 Phil. 8th ed. 843. 1 Mood. & Rob. 427. 2 id. 122. But vid. 2 id. 153.

(c) Cowen & Hill's Notes to Phil. Ev. 779, 782.

(d) 10 John. 128. 13 id. 350. 15 id. 239. 7 Cowen, 231.

(e) 1 John. 520. 5 id. 129. 10 id. 363. Ante, 879.

(f) 2 John. 189. 1 id. 142. 14 id. 481. 10 id. 363.

plaintiff's first showing that the subpoena itself was incapable of being produced ;(g) so, where he received as evidence the certificate of another justice, not properly authenticated ;(h) in all these, and a great variety of similar cases, judgments have been reversed on certiorari. So the judgment was reversed where the justice admitted hearsay evidence, touching a fact, though he returned that he merely admitted it as evidence to himself, but not to the jury.(i) Yet if the fact so improperly proved, or attempted to be proved, be afterwards established by legal evidence on the other side, the error is thereby cured.(j) And if an improper question be put and answered, even on an examination in the jury room, after the jury are sworn and have retired, but is immediately corrected by the justice, who tells the jury not to regard it, the judgment will not, for that reason, be reversed.(k)

On the other hand, if the justice improperly reject any testimony offered, the judgment will be reversed, on certiorari ; and in one case, where the judgment was in favor of the party offering such evidence, but its rejection diminished the amount of his damages, he brought his certiorari, and was allowed, for that reason, to reverse his own judgment.(l)

In all these and the like cases, it must appear that a proper offer or objection was made in the court below, or the point will not be regarded on certiorari. An offer of evidence, not of itself material, should add the proposal to show other connected facts, constituting in the whole, a relevant series. An objection to evidence not obviously and necessarily improper, should state the particular ground. Thus, suppose an instrument to be offered with a certificate of acknowledgment endorsed, which you mean to have excluded by reason of some defect in the certificate ; a general objection, even that there is a defect, will not do. The particular defect should be mentioned ; for peradventure, if pointed out, the objection will be allowed, or the defect conceded, and other proof of its execution adduced. A written contract is offered in evidence by the plaintiff, to the introduction of which the defendant objects, without saying why—he cannot, on error, be heard to say that the contract was not well declared on, or was not relevant. So, if he thinks a witness offered, appears already to be incompetent, by reason of interest, he cannot object generally to his being sworn ; but must state that he appears to be interested, and how. And so of a great many cases which might be added. If there be a defect in the evidence returned, and no objection for that

(g) 10 John. 248.

(h) 8 id. 429.

(i) 15 id. 239.

(j) 13 id. 517.

(k) 12 id. 384.

(l) 6 id. 100.

reason is stated to have been made, the court of error will presume it was duly supplied by proof. 8 John. 436. So it will be intended that the witnesses in the court below were sworn, though the return omit to state that fact ; no objection appearing to have been made on the ground that they were not sworn. 2 John, 378.

SECTION X.

HOW THE EVIDENCE WILL BE CONSIDERED AND WEIGHED, ON ITS BEING RETURNED ON CERTIORARI.

The court will not reverse the judgment, because the evidence was too light in the court below, if some evidence was given ;(*m*) though since the act(*n*) requiring justices to return the facts, the court exercise a more extensive jurisdiction in this respect ;(*o*) and where there is either no evidence in support of a demand,(*p*) or, where a fact clearly appears from the evidence on both sides, and there is no question as to the credibility of the witnesses, a verdict of a jury will not conclude the court of error ; but they will enquire into the sufficiency of the evidence to support the verdict ;(*q*) and if insufficient, the judgment will be reversed ;(*r*) though where there is evidence on both sides, so that the question is at least doubtful, the judgment will not be reversed, even if it be against the weight of evidence.(*s*)

An exception to the above remarks, is an action for a penalty—there, even if a verdict for the defendant be against the weight of evidence decidedly, the judgment will not be reversed, if no irregularity appear.(*t*)

And a verdict and judgment against the plaintiff, though contrary to evidence, will not be set aside, where it is obvious that the plaintiff is entitled merely to nominal damages.(*u*)

The provisions of the revised statutes of 1830,(*v*) have introduced no rule for considering the evidence returned on certiorari, materially different from that which prevailed under the act of 1813. If no evidence be returned, or some evidence, without stating it to be the whole that

(*m*) 1 id. 505.

(*n*) 1 R. L. of 1813, 397.

(*o*) 2 John. 195.

(*p*) Id.

(*q*) Id.

(*r*) Id. 3 id. 146. Id. 435.

(*s*) 12 id. 455.

(*t*) 10 id. 101.

(*u*) 18 id. 129.

(*v*) 2 R. S. 185, § 181.

was given, the intendment must be that it was sufficient to warrant the decision of the justice or jury.

When a question is intended to be raised on the sufficiency of the whole evidence in the cause, to sustain the judgment; or its sufficiency to sustain any collateral decision; it is essential that the return should state that it is the whole that was given in respect to the decision in question; and that the objection for insufficiency was taken in the court below. Then if the defect be substantial and plain, or the claim allowed illegal, the decision or verdict founded upon it will be reversed. But even then, it will not be disturbed, as against the weight of evidence, if there appear to have been the slightest ground for sustaining it. That it left the issue in doubt, is no objection. In such case, the decision, whether by the justice or jury, must be received as conclusive. The question was one of fact, which it is not the office of a certiorari to review. That reaches no farther than to the legal sufficiency or insufficiency of undisputed facts.^(w) In short, the assignment of errors is like a demurrer to evidence, which must admit, and does in effect admit, every fact and conclusion which the evidence conduces to prove; or, as it is said by some cases, any inference which the jury might, with the slightest degree of propriety, draw from the evidence. In short, the court of error will draw the same inferences from the evidence which a jury might have drawn.^(x) The same rule would doubtless be applied to the evidence upon any collateral issue, e. g. an issue upon the competency of a witness, or a challenge to a juror, or the necessity of producing secondary evidence.^(y)

SECTION XI.

OF THE JUSTICE'S DISCRETION IN ADMITTING OR REJECTING EVIDENCE; AND IN THE TIME AND MANNER OF HIS RECEIVING IT.

We have already noticed, that when a justice or jury has passed on the aggregate of evidence in a cause, the decision will, in general, be regarded as conclusive. The reason is, that different men may come to different results, on the same set of facts or circumstances; and here it

^(w) Vid. 3 John. 435. Id. 439. 3 id. 148, 436. 12 id. 298, 9. 3 Caines, 275. 15 Wen. 491. 18 Wen. 141.

^(x) Vid. 1 Phil. Ev. 314. Cowen & Hill's Notes, 796, 797.

^(y) Vid. the rule laid down in Men-

derback v. Hopkins, 8 John. 436; Hol-ly v. Rathbone, id. 148, and Kline v. Husted, 3 Caines, 275, as to the in-ferences which the court will draw from the evidence, on certiorari.

is always safest to rely on the decision of the court, having original jurisdiction, where the witnesses are examined. Such a court enjoys numerous advantages in this respect, which a court of error can not see and appreciate on a paper return.

There are also several questions of fact in the course of a trial, arising on collateral issues, always determinable by the justice, upon which his decision is equally, not to say even more absolute. Among these are the questions whether an infant has a sufficient sense of moral obligation to warrant his reception as a witness; whether an adult witness believes in the existence of Deity, and moral punishment for perjury; whether an agency is shown so as to let in the acts and declarations of the agent, as evidence against his principal; whether the loss or destruction of a paper is sufficiently verified to warrant the introduction of oral evidence, concerning its contents; or whether diligent and unavailable search has been made for a subscribing witness, and proof to show his handwriting, so as to warrant evidence of an inferior degree. The question of due search, especially, depends so much on various circumstances, that a decision of the justice one way or the other, can rarely be disturbed on certiorari with any degree of propriety. Whether a witness be a lunatic or intoxicated when offered as a witness, is of course still farther beyond the power of review, inasmuch as the question depends in a degree on personal observation at the time.

Other collateral questions springing up in the course of the trial, admit the exercise of a discretion still wider, not to say entirely absolute. Your proof varies from your declaration or plea. In such a case, whether the variance is to be overlooked within the statute before cited, ante, 923, 4; or the justice will allow an amendment of the pleading, so as to conform it to the evidence, is a question of discretion. If the variance be such as not to have misled the party objecting; above all if he in fact have not been misled, there can be no reason why a mere slip in the form of pleading, should shut out the merits. On the other hand, if the variance be so wide as palpably to have thrown the opposite party off his guard; or if he have in consequence failed to prepare himself for trial, under the belief that the diverging evidence would not be offered against him, and really have proof to repel it, the variance becomes material, and should neither be overlooked or amended. These things must, of course, be decided much upon appearances in the course of the cause, and sometimes on the examination of the party under oath. The latter may be material where a party avers that he has been misled, and failed therefore to produce certain proof, to the existence of which he will testify, and will at the same time say on oath, that he omitted, because he was led by the vari-

ance to suppose that the proof offered would not be attempted. This question of course never arises where the proof is admissible, under the state of the pleadings ; but only in cases where it is absolutely necessary to declare or plead specially ; and the variance is then material. For instance, variance from the day in a general count in assumpsit ; or variance from the facts set forth in a plea of usury, in the same form of action, to which the general issue is also pleaded, does not raise the question ; for, in the first case the day is not material, and in the last usury may be given in evidence under the general issue. But if the declaration should contain one count only, on a note which is misdescribed, or there should be a similar variance in the notice of setting off such a note, it would be otherwise ; for then the plaintiff, in the first case, and defendant in the latter, could not depart from the description of the note, as he might have done under a more general form. Yet ten chances to one, the opposite party comes just as well prepared for the real question. If the justice be satisfied of this, he may disregard the variance. So in a case of misstating a special contract by parol, he may allow or refuse an amendment. And so in many like cases, in his discretion.

Another question depending on the state of the pleadings is, which party shall begin, which answer and which reply, in other words which holds the affirmative and which the negative of the issue on trial. This in practice not only governs the priority of proofs as between the parties, but the order of opening the evidence and summing it up. It is, however, a matter of practice so much in the justice's discretion, that should he mistake, and no prejudice to the merits appear to have followed, the judgment would not, for that reason, be reversed. Otherwise, should he by mistaking the issue, cut off a fact admitted by the pleadings, on the ground that it was not proved. But it would be no objection, that a justice received proof offered to a fact so admitted or otherwise fully established.

So, where a case or defence is to be made out by a series of proofs, the justice has a discretion as to the order in which they shall be introduced. For instance, a defendant in trover proposes to make out that he took the goods, as a constable, from a vendor of the plaintiff, who purchased them with intent to defraud creditors. Whether the judgment or execution, or circumstances of fraud are to be proved first, secondly or lastly, is in his absolute discretion, though they must all be shown in the end to complete the defence. So, whether the witnesses, or any of them, shall retire on the party's suggestion that he wishes to avoid a concerted story ; and whether the wilful return of one ordered to retire shall be a cause of rejection. So, when a witness is asked, and without objection,

answers to a fact not relevant, the justice may or may not hear testimony in reply to the answer. But he is not bound to do it. And when a fact is fully proved, he is not bound to hear additional evidence to it; though he may. He also has a discretion to stop the idle multiplication of witnesses to any other fact. Thus, in impeaching a witness for bad character, he may stop the introduction of witnesses for or against his character, when either party or both parties have had what he may believe to be a full and fair opportunity as to the weight and number of impeaching or sustaining witnesses. He is not bound to waste his time in hearing more witnesses, either when the question appears to have taken a decisive turn, or been exhausted, or when they appear to be called and examined at random without answering in favor of the party calling them. Without some discretion in this and like matters there might be intolerable delay. He may also, in general, require the party offering a witness to state what he intends to prove by him; and moreover to state how he means to make that material, especially when the materiality is not obvious. Yet should he omit this, and the evidence given should turn out to be material, the omission would not be error. So if, on afterwards discovering it to be immaterial, the justice should reject it. The due exercise of this power becomes most important when the cause is tried by a jury. It is the duty of the justice to withhold all irrelevant testimony from them so far as this may be in his power. That can not always be done. A party may state that the proposed evidence will be followed by proof, giving it a character or bearing which it does not appear to have, when standing naked or insulated. In such case, if the justice do not choose to hear the ulterior proof first, he must in the nature of things, receive the offered proof provisionally, and direct the jury to disregard it if finally the chain be left incomplete. Almost any conceivable proof may be made material as a link in a chain, or as bearing upon something else arising or yet to arise in the course of the cause; and evidence is constantly regarded in reference to the object it is intended to reach. It may be quite immaterial for one purpose, and yet entirely relevant for another. Whether it shall be received at the particular stage when offered, or postponed, is a question on the mere order of evidence; but whether it shall ultimately weigh at all, may be vital to the question in the cause; and if the latter question be decided erroneously, it may constitute a serious objection on certiorari. The exclusion of a circumstance, which appears on the return to have been fit in any view to influence the decision of the jury or the justice sitting in their place, would be fatal on certiorari. Hence, in a case resting on a conclusion to be derived from circumstances, a fact of slight or remote influence should

be received. On the other hand, if it be in truth irrelevant, the receiving it would be a fatal error.

It is also a matter of discretion, whether a party calling a witness, shall be permitted to ply him with leading questions. If the justice be satisfied, from his manner or otherwise, that he is an unwilling witness for the party calling him, the party may be permitted, otherwise he should not be. So, whether a witness who has been examined in chief, cross-examined, and re-examined, shall be farther interrogated, or whether after leaving the stand, he shall be recalled. So, after all the proofs are regularly gone through with, whether a witness or witnesses shall be farther examined, and to what extent ; or whether any more proof, written or oral, shall be received. In strictness, the party calling a witness, is bound to finish his questions on the examination in chief, then the defendant must do the same thing on cross-examination ; and the witness can be re-examined only to cut down or explain matter which comes out on his cross-examination. So, taking the proof in the aggregate, the plaintiff or party beginning, must adduce all his proofs ; then the party holding the defensive or negative side ; and then the first may adduce evidence to rebut, qualify or explain away the matter proved against him. Beyond these boundaries, the justice may or may not allow the parties to go, in his discretion. This it is proper to allow, if he think any thing material has been inadvertently omitted, which is often the case. But the parties cannot, in their discretion, go back and renew their controversies, on a new state of facts. For a still stronger reason, the justice may or may not allow questions once put and answered to be repeated. A declaration may and generally does cover several causes of action, e. g. in trover for a cow and a sheep, suppose both parties go into their entire round of proofs in respect to the cow only. It might prove very vexatious in practice, if the plaintiff had a right in such case to go back and take the same round in respect to the smaller article, even though his proof failed as to the more important one. Strictly, he should have gone into proof of both before the defendant began. But yet the justice might allow it, and should do so, if satisfied that the omission to take the full ground in the first instance was inadvertent. These and like matters of discretion must be vested in every court of original jurisdiction, in order to protect it against vexatious delay.

So, though it is the duty of a justice to acquit or direct the acquittal of one among several defendants sued for a joint wrong, there being no proof against him ; the other defendants desiring to call him as a witness ; yet it is matter of discretion whether this shall be done at the

close of the plaintiff's proof, or not till the closing of all the other proofs in the cause, or at some intermediate stage.

It is also a matter of discretion, whether a justice will delay a cause already on trial, to await the arrival of an absent witness, whom the party states he expects soon to be in court. So of many other, indeed all matters in the course of a trial, which regard mere convenience to the parties or witnesses, but which cannot be claimed as matter of right ; as if a witness whose family is sick, or who is pressed with important business, be offered out of the regular order ; and no objection more serious than that of mere order should be interposed.

CHAPTER XI.

Of Damages.

For the manner in which damages should be claimed by the declaration, *vid. ante*, 658, 9.

SECTION I.

OF DAMAGES IN GENERAL.

Damages are a pecuniary recompense for an injury, *(a)* and are recoverable in every personal action which lies at the common law. *(b)* They are, in most cases, the sole object of the action. In some cases, however, they are merely nominal. Of the former description, are actions of assumpsit, covenant, case, trover and trespass.

1. In debt, the plaintiff recovers the specific debt ; and the verdict and judgment is for such debt, with damages for the detention, which are generally nominal. This rule is not, however, universal. For instance, in an action on a bond, in which the plaintiff is required by statute, 2 R. S. 300, § 6, to assign the specific breaches ; if such breaches are found to be true, and that the plaintiff should recover damages therefor, damages are to be assessed and specified, in addition to the finding upon any other question of fact. *Id.* § 7. So in many other cases not provided for by the statute. *Vid. Grah. Prac.* 2d ed. 319, and the cases there cited.

2. In causes other than actions of debt, the action is said to sound in damages, although the subject of it be a contract for the payment of money. There is, in general, but little difficulty in determining the amount

(a) Sayer on Damages, 1.

(b) *Id.* 6.

of damages, because they are, usually, a mere matter of pecuniary computation; as the money with the interest; or the value of the thing agreed to be delivered at the time and place of delivery; (c) the work agreed to be done; the goods sold; labor performed, &c.; or, in trespass or trover, the injury done to the real estate; or the value of the goods taken and converted, some of which subjects we have noticed under the head of the several actions to which they relate. In the present chapter I shall content myself with noticing a few rules regulating the computation of damages in certain cases, which would be doubtful of themselves without the aid of legal authority.

SECTION II.

OF DAMAGES IN AN ACTION UPON CONTRACT.

In estimating damages upon contract, the full sum agreed on by the parties, should, in general, be allowed. (1) Yet, if there are any circumstances of extreme and palpable hardship, fraud or deceit, though not sufficient to invalidate the contract, these may be considered, and the damages mitigated accordingly. As if I promise you 1000 dollars to find my cow; or one cent per nail for your horse, doubling every nail in his shoes, which may amount to a very large sum; it would be legal justice to give you the value of your labor, in the one instance, or of your horse in the other. (d)

Parties sometimes agree, that, in default of performance, a certain sum shall be paid by the one who fails to perform his contract; and the question frequently arises, whether this is a mere penalty, which, on forfeiture, is to have the effect of a penalty in a common bond; (e) or is in-

(1) This is to be understood of cases where the contract is to pay so much money absolutely, or on a certain condition. The general rule in actions to recover damages for the non-performance of contracts, (other than for the conveyance of land,) is, that the party ready and willing to perform, may recover damages to the extent of the *loss* or *injury* sustained by him; *the price agreed to be paid on actual performance* is not the measure of damages. Where, however, the non-performance is attributable to *fraud*, or to a desire to benefit the failing party, these circumstances may be taken into consideration to enhance the damages. 21 Wen. 457.

(c) 1 Bay, 106.

(d) Vid. Bac. Abr. tit. Damages, (D) and cases there cited.

(e) Vid. ante, 37, 8.

tended as stipulated damages, to be allowed in full, for the breach of the contract. To determine this question, attention should be given to the real intent of the parties, and the nature and terms of the agreement. Thus, should I agree to buy your horse, and pay you his value, and, if I fail, then to pay you one hundred dollars, which sum is equal to the value of the horse, this would be a penalty ; because the sum stipulated is obviously, beyond the damages you can sustain by my refusal to receive him. But, had it been five or ten dollars, the construction would be different.(f) But even in this case of the horse, where the parties go on to say, in so many words, " we consent to fix and liquidate the one hundred dollars, as the amount of damages to be paid by the failing party ;" this would bind to the payment of the sum as stipulated damages ; for the intent is too plain to admit of misconstruction.(g) But, " in all cases where a party relies on the payment of liquidated damages *as a discharge*, it must clearly appear from the contract, that they were to be paid, or received, *absolutely in lieu* of performance. *Graham v. Bickham*, 4 Dallas, 150. In the case of *Slosson v. Beadle*, 7 John. 72, and *Hasbrouck v. Tappen*, 15 John. 200, it expressly appeared, that the damages were *in lieu of performance*, and payment thereof was an alternative reserved for the party's election."(h) And so, if I agree, in consideration of twenty dollars, to deliver you twenty bushels of wheat, or pay you thirty dollars, upon my failure, you may recover the thirty dollars ; for the election then falls to you.(i) Vid. further on this subject ; 2 Bos. & Pull. 346 ; 3 id. 630 ; 4 Burr. 2225 ; Holt, 43 ; 2 T. R. 32 ; 1 Bing. 302 ; 8 Moore, 244 ; 6 Barn. & Cress. 216 ; 9 Dowl. & Ryl. 369 ; 3 Moore & Payne, 587 ; 6 Bing. 242 ; id. 141 ; 3 Moore & Payne, 425 ; 5 id. 768 ; 3 Carr. & Payne, 240 ; 2 id. 577 ; 7 Bing. 735 ; 5 Cowen, 150, note ; 7 Cowen, 307. Vid. also 17 Wen. 447, 454, 455, 456, opinion of Nelson, C. J.

Where I agree to carry goods from A. to B. the difference between their value at A. and their increased value at B. is the proper measure of damages, for a breach of the contract ;(j) but if I had lost the goods, the plaintiff should recover in damages, only their value at the place of starting.(k) This last position settled in *Caines*, is now overruled ;(l) and the damages determined to be their value, at the place of destina-

(f) 3 John. Cas. 297, and note, (a.)
Vid. also 5 Cowen, 144, S. P.

(g) 15 John. 200. Vid. also 13 Wen.
587, S. P.

(h) 18 John. 225, per Woodworth, J.
Vid. also 12 Wen. 393, S. P.

(i) 7 John. 72.

(j) 14 John. 170.

(k) 3 Caines, 219. 15 John. 24, contra.

(l) Id.

tion ; and that too accompanied with interest on such value, if the carrier, or his agents or servants, be guilty of fraud or gross misconduct ; but not otherwise.(m)

In an action for goods of a certain quantity and description sold to the defendant, at a price agreed on, if the goods delivered do not answer the description, in consequence of which the defendant sustains a loss, this may be shown in mitigation of damages, though the goods be not returned, and notwithstanding the price is agreed. The defendant need not be driven to a cross action, nor need the goods be returned. The latter is necessary, only where the goods sold, are taken on trial, with liberty to return them within a limited period, if the vendee dislike them.(n)

In an action on a chattel note, in these words, "For value received, I promise to pay A. B. \$79,50 on, &c. in salt, at 14s. per barrel," it was held that the sum specified in the note, and not the value of the salt on the day specified for the payment, was the true measure of damages.(o) But had the note or contract been to deliver so many barrels of salt at all events without attaching any price to it, the rule of damages would then be, the value of the salt.(p) And where a vendor is in default for not delivering goods in pursuance of a contract of sale, *and no money has been advanced by the vendee*, the true measure of damages is the difference between the contract price, and the value, at the time the article should have been delivered, with the interest ; but *where the consideration is paid in advance*, the measure of damages is the highest price at any time between the period fixed for delivery and the day of trial, especially where the goods are intended by the vendee to be used for the purpose of trade.(q)

Where drovers are sued for the price of cattle entrusted to them to be taken to market and sold, the jury will be warranted in allowing the highest sum according to the evidence ; the defendants neglecting to show the prices for which the cattle actually sold.(r)

I sue you in the common pleas ; but we agree to discontinue the suit, (which I actually do,) and submit it to arbitration ; but on attempting to arbitrate, you revoke the submission : my damages are the costs of the suit, and the expenses in proceeding to arbitrate.(s)

In an action upon a bond given to authorize the issuing of an attach-

(m) Id.

(n) 18 id. 141, 144.

(o) 5 Wen. 393. Vid. 5 Cowen, 152, 411. 7 id. 682.

(p) 5 Wen. 393, 396, 7, by the Chancellor.

(q) 7 Cowen, 681. 9 Wen. 129. 4 Paige, 561. Vid 20 Wen. 91.

(r) 4 Wen. 628.

(s) 3 Day, 118.

ment,(t) the measure of damages is not the *mere taxable costs* in the attachment suit: the obligee may recover his *damages at large*, for the seizure, detention and deterioration of his goods, his time and trouble in defending the suit, expense of employing counsel, &c. &c.(1)

A. defends an action at the desire of B., in which action B. is concerned, and may be benefitted by the event, and A. has a verdict against him. B. is liable to pay the expenses of the defence.(u) But a person indemnified cannot charge the person indemnifying with the costs of defending an action for a debt clearly due, unless authorized by him to defend in that particular case.(v)

In debt on bond, though the court have power to award execution for less than the penalty, where the damages for the breaches do not reach it in amount, yet, in general, they can render judgment for no more than the penalty. But where the condition is, for the payment of money, or any sum carrying interest, which is a question of law, and the whole sum, with interest, exceeds the penalty, there the plaintiff may recover the penalty with interest thereon, after the first instalment becomes due, or other forfeiture happens, provided so much is due by the condition, but beyond this they have in no instance gone.(w) The English cases, on this head, may all be found ranged in chronological order, in 4 Day, 35. In an action on a bond, of mere indemnity, the plaintiff must, in order to sustain an action for any thing, show that he has in fact sustained damages, and to such a bond, a plea that the plaintiff has sustained no damages, (*non damnificatus*),(x) is good. In one case, where the defendant bound himself to pay a bond, due from the plaintiff, and added words obliging himself to hold the plaintiff harmless and indemnified against the payment thereof, &c. it was held that this was a mere bond of indemnity, to which *non damnificatus*, was a good plea.(y) But, in general, where the obligor binds himself to do any act, other than mere indemnity, as to remain a true and faithful prisoner, the penalty is forfeited on omitting to perform the act.(z) And so, where the defendant covenants with

(1) This has been recently decided by the supreme court in several cases, none of which are yet reported. The decision is at variance with the opinion expressed in the first edition of this treatise at p. 266, upon the authority of *Fitch v. The People*, 16 John. 141. On examination, that case is clearly distinguishable, in many important features from, and can therefore form no criterion for the estimate of damages in the action upon an attachment bond; and such is the opinion of the supreme court.

(t) Ante, 488. 489.

(u) 1 Esp. R. 162.

(v) Mood & Malk. 406.

(w) 4 Day, 30. 3 Caines, 48. 1 John.

(x) Ante, 694.

(y) 14 John. 177.

(z) 5 id. 42.

the plaintiff to keep and perform all the covenants of the plaintiff, in a certain lease, one of which covenants is, that he shall pay the rent of the premises, the covenant of the defendant is broken on the rent falling due, and remaining unpaid, though the plaintiff may not have paid any part of it himself; and *non damnificatus* is not a good plea.(a) But the *amount* of damages to be recovered in these two last cited cases, from Johnson, is another consideration, which was not decided by them.

Where A. agrees to let certain premises to B., who breaks up his establishment and proceeds with his family and furniture to the place where the premises are situated, and A. refuses to give possession, B. is entitled to recover the damages sustained by him in so removing, although special damage is not alleged in the declaration.(b)

In an action for the price of building a steamboat, it was held that the plaintiff was entitled to recover the full amount, without any deduction in consequence of damage sustained by the defendant for the loss of trips, and the profits which would have resulted therefrom, occasioned by defects in the boat or machinery. In such a case, however, the defendant is entitled to an allowance for moneys necessarily expended by him in supplying *defects* in the vessel or machinery, so as to make it conform to the contract. The courts of common law seem inclined to adopt the rules of the civil law in respect to damages for the breach of contracts relating to personal property, which is, that the party entitled to claim performance, may claim damages for the non-performance *in respect to the particular thing, the object of the contract*; but not such as may have been accidentally occasioned thereby *in respect to his own affairs*—as for instance, a lessee who is evicted by title paramount, may recover the *expense of removal*, and indemnity for *advanced rents*, but is not entitled to recover for *loss of custom* established while residing in the house.(c)

In an action against a tenant for not repairing, pursuant to his agreement, enough damages should be given to make the repairs stipulated for, but omitted by the tenant.(d) And if it appear that the premises become more out of repair after the commencement of the suit, the justice or jury may consider this in assessing damages.(1)

When you sell goods to me, which belong to another, and I sell the goods to a third person, who is evicted, and sues and recovers of me the price of the goods; in an action against you, I can recover the costs

(a) 17 id. 479, and vid. 1 Bos. & Pull.
628.

(b) 17 Wen. 71.

(c) 21 id. 342.

(d) Salk. 141. Ld. Raym. 1126.

(1) Ld. Raym. 803.

of the action against me, as special damages upon breach of your warranty, besides my other damages.(e)

If a party, entitled under a contract to receive a profit from another, by his own act so confounds the measure of that which he was to receive, that it can be no longer ascertained, he vacates his whole claim.(f)

On a written contract for a sum certain, the instrument itself furnishes the rule of damages, which is the principal and interest, but no more,(g) except where the effect of the contract is to increase the damages so as to exceed the legal rate of interest; in such case, the measure of damages furnished by the instrument, is disregarded.(h) But the question frequently arises on contracts for the payment of money, other than such as of themselves furnish the rule of damages, whether they shall carry interest; and there is some difficulty as to the principles upon which it is to be cast, and the time when it begins to run, upon such contracts as do carry interest. This subject was partially noticed in treating of usury; but from the frequency of its occurrence among all classes, I shall give it a more particular consideration.

It is a general rule, that all contracts, express or implied, for the payment of money, draw interest from the time of the money falling due;(i) and all contracts or running accounts may draw interest, (if it be so agreed by the parties,) from such time and in such manner as shall be fixed upon by them, at or after the contract was entered into, or even before that time, if the money was in fact due, and the previous time was not agreed on, to cover usury; otherwise no interest arises till the money fall due.(j) Thus, interest is allowable on an account stated, and balance struck.(k) And if an account be transmitted to a debtor, and lie a long time without objection, or is assented to, or presented and not objected to by him, it becomes thereby liquidated, and interest is allowable.(l) So, entries in the books of account of a firm, in the handwriting of one of the partners, exhibiting a *debit* and *credit* side of the account, from which it appears that a balance is due from the firm, although no balance is struck in the books, are a sufficient liquidation to entitle a creditor to interest on such balance from the time that the parties inspected the accounts while in that situation.(m) And where I settle my note or account with you, carrying interest, and give you a new note for both principal and interest, and stipulate that the new note shall carry interest on the whole, this

(e) 7 Taunt. 153.

(f) 2 id. 150.

(g) 1 Day, 1.

(h) 1 H. Bl. 227.

(i) 7 Wen. 109.

(j) 1 Hen. & Munf. 211. 2 Paige, 207.

(k) 3 Caines, 234.

(l) 8 id. 234. 15 John. 409.]

(m) 7 Wen. 441.

is lawful, and cannot be objected as usurious.(n) Interest is allowable on money had and received, or money lent and advanced, though no interest be stipulated ;(o) and although the party withholding the money, has a set-off.(p) So, on a certain rent payable in money,(q) though otherwise if payable in wheat, or other specific chattel ;(r) and such interest on rent, where payable in money, must be recovered by action, and cannot be distrained for.(s) Interest is recoverable in an action for money had and received, against a sheriff, constable, &c., who neglects to pay over moneys collected by him on demand.(t) And so, in an action on the case, for money which is lost by the negligence of a sheriff, or constable, in not collecting it.(u) All judgments draw interest from the time of their rendition, and if rendered on *contract* or *prior judgment*, the interest may be collected in the execution, but if rendered for a tort, it must be collected by suit on the judgment.(v) Interest is also allowable by way of damages in trover, from the time of the conversion ;(w) and in assumpsit for a breach of contract to deliver wheat.(x)

Payment of the amount of principal money due from a debtor to his creditor, will not prevent an action for the amount of the interest ; unless the payment be made and received specially in extinguishment of the principal. If made generally, it applies first to extinguish the interest, and the balance may be sued for as principal.(y) Where interest is not agreed to be paid by the terms of the contract, if the creditor receive the principal, he cannot afterwards sue for the interest ; otherwise where interest is stipulated for in the contract.(1)

If a note mention no time of payment, it draws interest from the date, being payable immediately ;(z) and where no rate of interest is specified, the note draws interest after the legal rate.(a)

Interest is not recoverable on unliquidated damages, or uncertain demands,(b)unless there be an agreement express or implied to allow interest ;(c) nor on open, running or unliquidated accounts, unless there be some usage of trade, or other circumstances, from which an agree-

(n) 1 Hen. & Munf. 4.
 (o) 3 Caines. 226, 266. 3 John. Cas. 383. 9 John. 71 1 Hayw. 4.
 (p) 10 Wen. 96.
 (q) 4 John. 183.
 (r) 1 id. 276.
 (s) 6 id. 43.
 (t) 13 id. 255. 14 id. 255.
 (u) 14 id. 255.
 (v) 2 R. S. 288, § 9. 3 Wen. 496. 19 id. 101.
 (w) 7 Wen. 354. 4 Cowen, 53.
 (x) 3 Wen. 356.
 (y) 5 Cowen, 331. 13 Wen. 639. 2 Paige, 207.
 (1) 15 Wen. 76.
 (z) 2 Hayw. 32. 15 Wen. 308.
 (a) 3 Cowen, 284. Vid. ante, 189, 190. 252.
 (b) 1 John. 315. 7 Wen. 178. 6 Cowen, 193. 3 id. 393. 5 id. 587, S. C.
 (c) 4 Cowen, 496.

ment to allow interest may be inferred.(d) Thus, a merchant or manufacturer whose uniform custom it is to charge interest after *ninety* days upon articles sold by him, is allowed to charge interest accordingly, to those who are in *the habit of dealing with him*, they being *presumed* to know such custom and to act in reference thereto.(e) But the testimony of a witness, that it is the uniform practice of *grocers* to charge *interest* on goods sold, after ninety days, does not amount to proof of the usage of a particular trade of which all dealers in that line are bound to take notice and are presumed to be informed; and a country merchant buying of a wholesale grocer was held not bound to pay interest according to such practice, especially where former accounts rendered contained no charges for interest.(f) Interest is however recoverable on *cash* advances, though they rest in the form of a mutual, current, unliquidated account;(g) but a party may, it seems, apply such payments to the satisfaction of his account against his customer, and allow interest only on the excess unless he be otherwise directed.(h) But an account consisting of items on the part of the plaintiff, and only of *credits of payments* on the part of the defendant, is an unliquidated running account, upon which interest is not recoverable without an agreement express or implied.(i) If a certain sum of money be given by statute, by way of penalty, to the party aggrieved by an injury, he may recover interest as damages for the detention thereof; because the money, it being a sum certain, is to be considered as a debt. But where the penalty goes to an informer, he having no right to the money till the commencement of the action, interest is not recoverable.(j) Nor is it recoverable upon an attorney's bill of costs, unless liquidated by agreement;(k) nor on money due for goods sold and delivered, though to be paid for at a certain day, and a price agreed on.(l) But if there be an agreement to pay for such goods, in a bill or note, which is not done, interest will be allowable from the time the bill or note would have fallen due.(m) Interest is not allowable in an action for work and labor.(n) But the rule now seems to be, that when the price of the goods, or the sum to be paid for the services, and the time of payment, are fixed, interest will run from the time

(d) 3 Caines, 226. 6 John. 45. 2 Hen. & Munf. 603. 2 Bay, 233. 2 Wen. 413. Id. 501.

(e) 4 Wen. 433.

(f) 2 id. 501.

(g) 3 Cowen, 393. 5 id. 537, S. C. 2 Wen. 413.

(h) 2 Wen. 413.

(i) Id. 501.

(j) Sayer on Dam. 71, 2.

(k) 2 Bos. & Pull. 219.

(l) 3 Wils. 205, 6. 2 Campb. 429.

(m) 2 Campb. 428. 13 East, 3. Id.

(n) 1 Campb. 50, 51, per Ld. Ellen-

borough, C. J.

of the money falling due ; or, when no day of payment is fixed, from the time of demand or commencement of suit, which is a demand in law.(o)

Interest should be calculated according to the law of the place where the contract is to be performed.(p) If not to be performed, by its terms, out of the country where it is made, then interest is to be cast according to the law of the place where it is entered into.(q) And in this state it is provided by statute, that, for the purpose of calculating interest, a month shall be considered the twelfth part of a year, and as consisting of thirty days ; and interest for any number of days less than a month, shall be estimated by the proportion which such number of days shall bear to thirty. And whenever in any statute, act, deed, written or verbal contract, or in any public or private instrument whatever, any certain interest, is or shall be mentioned, and no period of time is stated for which such rate is to be calculated, interest shall be calculated at the rate mentioned, by the year, in the same manner as if the words "per annum," or "by the year," had been added to such rate.(r)

When partial payments have been made on the debt, from time to time, the question has frequently arisen, in different courts in the United States, as to the mode of casting it.

The rule adopted by the supreme court of this state is, to calculate interest on the principal, up to the time when the payment has been made, add this interest to the principal, and then deduct the payment without regard to the time when made, whether before or after the expiration of the year. This rule, however, is to be adopted only in cases where the payment exceeds the interest due ; otherwise it will be taking interest upon interest. When the payment falls short of the interest due, interest must be calculated on the principal up to the time when the payments will overrun the interest due on the principal debt ; and the deduction then be made.(s) "The principle adopted by the late Chancellor Kent, is laid down by him in nearly the same words. 'The rule' (says he) 'for casting interest, when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be

(o) 7 Wen. 109, 112. 11 id. 477. 20 id. 51.

(p) 2 John. 235. 17 id. 511.

(q) 2 Hayw. 5. Vid. ante, 190.

(r) 1 R. S. 761, § 9, 10 ; and vid. ante, 194, 262, 3.

(s) 3 Cowen, 86, 87.(note.)

less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal; and interest is to be computed on the balance of the principal as aforesaid.' 1 John. Ch. R. 17, 18. 2 id. 209, S. P.(t)

The same rule prevails in *Massachusetts*, 4 Mass. R. 103; 17 id. 417, 418; 1 Pick. 194. In *Virginia*, 1 Hen. & Munf. 431. *North Carolina*, 1 Hayw. 279; 2 id. 17; id. 151. *Maryland*, 4 Har. & McHen. 94. *Kentucky*, 4 Hall's Law Journ. 122. *South Carolina*, 2 Nott & McCord, 395, 397.

In *Connecticut*, the rule is the same, with the qualification that the first payment shall not be applied to the extinguishment of the interest, unless it be made at least one year from the time the interest began to run, nor as to subsequent payments, unless there be at least one year between them. Kirby's R. 49. Id. 326. This is upon the ground that interest cannot be due except from year to year.

In *New-Jersey*, the rule is the same as in this state, with the difference that it disregards the amount of the payment which is applied to the extinguishment of the interest whenever paid, and whether less or more than the interest accrued. At least no distinction is made between these two cases in *Meredith v. Banks*, 1 Halst. 408, where the rule is laid down.

In *Tracy v. Wikoff*, 1 Dal. 124; *Pennsylvania*; M'Kean, C. J. said, 'The rule of computing interest must be such, that the interest of money paid in, before the time, must be deducted from the interest of the whole sum due at the time appointed by the instrument for making the payments. For instance, a bond to pay £100 with annual interest at 6 per cent., and at the end of six months, £50 is paid in. This payment shall not be apportioned, £3 to the discharge of the half year's interest, and £47 to the diminution of the principal, so as to calculate the remaining interest at 6 per cent. on £53 for six months; but the interest shall be charged at the end of the year upon £100; the payment of £50 shall then be deducted from the aggregate sum of £106, and the obligor receive a credit for £1 10s. as the interest of £50 for six months. In *Penrose v. Hart*, id. 378, *Shippen*, President, said, he remembered to have heard of an old decision, when Logan was Chief Justice, in which it was expressly settled, that money paid on account of a bond, should first be applied to discharge the interest due at the time of the payment; and

(t) And vid. 2 Paige, 207.

the residue, if any, credited towards satisfaction of the principal; and this rule had been adopted as the uniform practice.

In *Lewis v. Bacon*, 3 Hen. & Munf. Virg. R. 89, where a creditor kept an account current with his debtor, and also an interest account, in which he charged interest on the several items of debit to a particular period, and gave credit by interest on the several payments to the same period, and charged in the account current the balance appearing on the interest account, and a balance being then struck, interest was again charged on the balance thus consisting of principal and interest; the court held it to be compound interest, and not allowable.”(u)

The result of these authorities, would seem to warrant the New-York creditor, in claiming interest at least to the extent of the rule laid down by Mr. Walsh, in his arithmetic, as the one adopted by the courts of law in Massachusetts, for casting interest in that state,(v) viz :

“Compute the interest on the principal sum, from the time when the interest commenced, to the first time when a payment was made, which exceeds, either alone or in conjunction with the preceding payments, (if any,) the interest at that time due: add that interest to the principal, and from the sum subtract the payment made at that time, together with the preceding payments, (if any,) and the remainder forms a new principal; on which compute and subtract the interest, as upon the first principal: and proceed in this manner to the time of judgment. By this rule the payments are first applied to keep down the interest; and no part of the interest ever forms a part of a principal carrying interest.”

He illustrates this rule by the following example, calculating interest at 6 per cent. that being the Massachusetts rate :

A. by his note dated January 1, 1780, promises to pay B. \$1,000 in six months from the date, with interest from the date. On this note are the following endorsements :

Received April 1, 1780, \$24. August 1, 1780, \$4. December 1, 1780, \$6. February 1, 1781, \$60. July 1, 1781, \$40. June 1, 1784, \$300. September 1, 1784, \$12. January 1, 1785, \$15. October 1, 1785, \$50. And the judgment is to be entered December 1, 1790.

(u) 3 Cowen, 88, 89.(note.)

(v) Walsh's Arithmetic, 4th ed. Salem, 1818, p. 116.

CALCULATION.

The principal sum, carrying interest from January 1, 1780,	\$1,000 00
Interest to April 1, 1780, (3 months,)	15 00
	<hr/>
Amount,	\$1,015 00
Paid April 1, 1780, a sum exceeding the interest,	24 00
	<hr/>
Remainder for a new principal,	\$991 00
Interest on \$991 from April 1, 1780, to February 1, 1781, (10 months,)	49 55
	<hr/>
Amount,	\$1,040 55
Paid August 1, 1780, a sum less than the interest then due,	\$4 00
Paid December 1, 1780, do. do.	6 00
Paid February 1, 1781, do. greater do.	60 00
	<hr/>
	70 00
	<hr/>
Remainder for a new principal,	\$970 55
Interest on \$970,55, from February 1, 1781, to July 1, 1781, (5 months,)	24 28
	<hr/>
Amount,	\$994 81
Paid July 1, 1781, a sum exceeding the interest,	40 00
	<hr/>
Remainder for a new principal,	\$954 81
Interest on \$954,81, from July 1, 1781, to June 1, 1784, (2 years, 11 months,)	167 09
	<hr/>
Amount,	\$1,121 90
Paid June 1, 1784, a sum exceeding the interest,	300 00
	<hr/>
Remainder for a new principal,	\$821 90
Interest on \$821,90, from June 1, 1784, to October 1, 1785, (1 year and 4 months,)	65 75
	<hr/>
Amount,	\$887 65
Paid September 1, 1784, a sum less than the interest then due,	\$12 00
Paid January 1, 1785, do. do.	15 00
Paid October 1, 1785, do. greater, with the two last payments, than interest then due,	50 00
	<hr/>
	77 00
	<hr/>
Remainder for a new principal,	\$810 65

Amount brought forward,	\$810 65
Interest on \$810,65, from October 1, 1785, to December 1, 1790, the time when judgment is to be entered, (5 years and 2 months,)	251 30
Judgment rendered for the amount,	\$1,061 95

SECTION III.

OF DAMAGES IN AN ACTION FOR A WRONG.

In actions for a *tort* or *wrong*, the damages may, nay should, in some cases, exceed the mere naked injury sustained. Thus, in an action for seducing a wife or daughter, or for a breach of promise of marriage, which is in nature of a *tort*,^(w) exemplary damages are frequently given, on the ground of injured feeling and reputation, and upon a consideration of the fortune and rank of the parties;^(x) and other considerations to which we adverted, when speaking of these actions, ante, 350 to 359. The same consideration of injured feeling has been held a proper one in an action on the case, brought by a parent or master, for the loss of service from an assault and battery committed upon his child or servant.^(y) So, a consideration of the evil example of the defendant's conduct, is oftentimes proper.^(z) But in an action by a mother for seducing her daughter, it was held that the jury erred in allowing her, as damages, a sum for bringing up the child.^(a)

In the action of trespass, where the conduct of the defendant has been wilful, malicious or cruel, exemplary damages, or smart money, is also frequently given, by way of punishment to the defendant, and a liberal indemnity to the plaintiff for his time and expense in seeking his remedy, as well as his damages, properly so called;^(b) and an exercise of this discretion is, many times, highly salutary and necessary. Accordingly, in an action for enticing away the plaintiff's indented servant, the general rule is, to give damages for the value of the service during the time

(w) 2 Maule & Selw. 408.

(x) 2 T. R. 4. Reeve's Dom. Rel. 291. 3 John. 64. 1 Coxe's R. 77, 79.

(y) 2 T. R. 4. Vid. 20 Wen. 210, S. P.

(z) 3 John. 56.

(a) 5 Cowen, 106.

(b) 14 John. 352.

of the servant's employ with the defendant ; but the jury may, in aggravated cases, give the whole value of the servant in damages, for the whole time during which he is indented.(c) And in an action for throwing poisoned barley upon the plaintiff's premises, in order to poison his poultry, it was held that the malicious intent of the defendant might be considered, and exemplary damages given accordingly.(d) Where, however, the defendant acts in good faith, supposing the goods to be his own ; or seizing goods under an execution, supposing them to be the defendant's in the execution, and in other cases where he acts under a mistaken or doubtful right, it would be the height of absurdity to give any thing beyond the plaintiff's actual damages.

In trover or trespass, for taking and converting goods, the increased value of the chattel converted, at the time of demand, at any subsequent time, or even down to the time of the trial, with interest from the time of conversion, may be allowed, in the discretion of the justice or jury.(e) And indeed, in trover, the true rule of damages is, the highest price intermediate the time of conversion and trial.(f) But, in general, the measure of damages, in these cases, is the value of the goods at the time and place of conversion ;(g) though it is always proper to allow interest by way of damages upon that value, from the time the goods were taken, or wrongfully converted. A bailee, or one having a special property in chattels, being answerable to the general owner, unless he takes good care of them, may recover their whole value in damages against the wrongdoer, who takes them away ;(h) and this, though the bailment is merely gratuitous.(i) In trover, for a bill of exchange, the measure of damages is the principal and interest due thereon, at the time of the conversion.(j) The price at which goods are sold at a sheriff's or constable's sale is not necessarily the measure of damages in trover, if the sale be wrongful ; but where the plaintiff is an assignee, as he must have sold the goods if they had come to him, juries are often induced to find a verdict for no more than the sum at which the sheriff actually sold.(k) And where the property of a party is sold under illegal process, and the sum demanded is raised by a bid of an agent of such party, who purchases for the benefit of his principal, and pays for the same with the

(c) Anth. N. P. R. 94. Vid. 4 Moore, 12. 1 Stark 287.

(d) 2 Stark. R. 317.

(e) 2 Caines' Cas. in Error, 216. 2 John. 280. 8 id. 446. 1 Car. & Payne, 625. Vid. 20 Wen. 91.

(f) 3 Cowen, 82. The same rule prevails in an action for the non-delivery of goods contracted to be delivered at a

specified time, where the price is paid in advance. 7 Cowen, 681. But Vid. 5 Wen. 395, by the Chancellor.

(g) 14 John. 128. Anth. N. P. 156.

(h) 5 Binney, 457.

(i) 1 Barn. & Ald. 59.

(j) 3 Campb. 477.

(k) 3 Car. & Payne, 344.

money of his principal, the measure of damages, in an action of trespass, is the amount of the bid and interest, and not the value of the property sold.(l)

Where property is *wrongfully taken*, the subsequent sale of it under an execution in favor of the *wrongdoer*, will not save the party from answering in damages to the full value of the property. Perhaps if the execution were in favor of a *third person* against the *owner*, that fact might be shown in mitigation of damages.(m)

If a box of clothes, packed by the party's own hand, be sent by a carrier and lost; in an action to recover the value, the justice or jury should give the fair value of it in damages, although what particular articles the box contained cannot be proved.(n)

If by the negligence of A., on building his house adjoining that of B., the house of B. is thrown down, A. is liable only for such sum in damages as was the value of the old house, and not the whole expense of building a new one.(o)

In an action for encroaching on the plaintiff's wharf or landing, the rule of damages is the current value of the landing, during the time of the encroachment.(v)

In an action against a sheriff for an escape from mesne process, (and, by parity, against a constable for an escape from a warrant,) the plaintiff is entitled, *prima facie*, to recover his whole demand, as it stood against the original defendant; and it lies with the defendant in the action for the escape, to show that the plaintiff's damage is less than his whole debt, by proving the inability of the defendant to pay. And it seems, that if the original defendant has property at the time of the escape, the plaintiff is entitled to recover the whole value of such property, as damages in the action for an escape, if it do not exceed the debt due from the one who escaped, with the costs of the action from which he escaped. This is upon the presumption that the confinement of the defendant would have coerced the appropriation of such property to the payment of the debt.(w) The same rule would probably prevail in case of a false return, or neglect to arrest.(x) And where an attorney neglects to defend a suit in which he is retained, and in consequence thereof, judgment by default is obtained against his client, he is, *prima facie*, liable to the amount of the whole recovery.(y) And so, by parity, where an offi-

(l) 9 Wen. 36.

(m) 21 id. 394.

(n) 2 Car. & Payne, 613.

(o) Peake's Add. Cas. 15.

(v) Anth. N. P. 85.

(w) 9 John. 300. Vid. also 17 Wen. 543.

(x) Vid. Ld. Raym. 1411.

(y) 7 Bing. 413. 1 Barn & Adolph. 415.

cer neglects to arrest, &c., or makes a false service and return of process, by which a party is thrown in default. In these cases, however, the defendant may mitigate the damages, by showing that a debt was due, that there was no defence to the action, &c. &c.(z)

In an action on the case for wrongfully taking a horse and wagon belonging to the plaintiff, from the possession of a third person to whom they had been let, and using them, damages are recoverable for the time spent and expenses incurred in searching for the property, provided such damages are specially claimed in the declaration.(a)

SECTION IV.

OF DAMAGES IN REFERENCE TO THE TIME WHEN THE ACTION IS COMMENCED, AND THE FORM OF PROCEEDING IN THE SAME.

We have before seen that the plaintiff can recover no more damages than he claims by his declaration.(b) If the jury find more, he must relinquish the excess;(c) and this must be done before the justice renders judgment; if not done till afterwards, it is too late to save the judgment from a reversal for the error.(d) So, where the jury find damages for the defendant, when he is entitled to none; as where no set off is claimed or allowable; the defendant may remit, and the justice may strike out the damages found, and give judgment for the defendant, generally.(e) This is the rule at common law; but it is also provided by statute, that when a balance is found in favor of a party, either by the verdict of a jury, or upon a hearing before the justice, exceeding the sum for which a justice is authorized to give judgment, such party may remit and release the excess, and may take judgment for the residue. Vid. 2 R. S. 177, § 125.

It is, moreover, a general rule, that the plaintiff cannot, in a personal action, (and this kind of action alone is cognizable before a justice,) recover any damages, except those which arose before the commencement of the suit.(f) But wherever a duty is incurred, pending the suit, incident

(z) Id. Vid. 10 Conn. R. 1. Vid. also 20 Wen. 321.

(a) 20 Wen. 223.

(b) 1 Caines, 593. 2 W. Bl. 1800.

(c) Bac. Abr. tit. Damages, (d) 2. Vid. 7 Wen. 390. 1 H. Bl. 643.

(d) Vid. 4 John. 414. 2 Str. 1110. 2 W. Blac. 1900.

(e) 4 John. 414.

(f) 10 Co. 116, 117.

to, or growing out of the cause of action for which the suit is brought, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given in the action already depending. Thus, in an action of *assumpsit* for principal and interest, the latter should be brought down to the time of the judgment, the interest being a mere accessory to the principal, for which no separate action will lie.(g) But when a new action will lie for any duties or demands arising since action brought, they cannot be included in the first suit. Thus, in an action of covenant for the non-payment of rent, if any rent fall due after action commenced, it must be made the subject of a subsequent suit. And in trespass, and indeed, in torts generally, new actions may be brought as often as new injuries and wrongs are repeated, and hence damages ought to be assessed only up to the time of the wrong complained of.(h) Upon this principle it is, that where the plaintiff declares that the defendant enticed away his servant, by which he lost his service, from such a time, (before the commencement of the suit,) to such a day, (after the commencement of the suit,) and judgment is given for the plaintiff, generally, without distinguishing that damages are allowed for the time only which preceded the commencement of the suit, such judgment is erroneous.(i) And it is a general rule, that where a declaration claims damages, as arising from some matter, either previous to the plaintiff's having any cause of action, or subsequent to the commencement of the suit, and a verdict or judgment is rendered upon such a declaration for damages generally, it is erroneous; for it appears from the face of the proceedings, in such a case, that the plaintiff's whole claim was allowed, or if it was not so allowed in fact, it is impossible to know this, from any thing appearing in the verdict or judgment, by which the damages are assessed.(j) To remedy this, the jury who give their verdict, or the justice who gives judgment for the damages, may, in such verdict or judgment, state specially, that damages are given only for the particular time allowable.

(g) 2 Burr. 1086, 7. 3 John. 229.
(h) 2 Burr. 1087.

(i) 2 Saund. 169.
(j) Vid. 2 Williams' Saund. 171.

SECTION V.

OF ASSESSING THE DAMAGES, WHERE THERE ARE SEVERAL DEFENDANTS.

If several defendants are, in the same action, charged with a joint wrong, and all are found guilty, the damages must be joint, and one cannot be found guilty in so much damages, and another in another ;(*k*) for, in such case, we have seen that the act of one defendant is the act of all ;(*l*) and is not, therefore, susceptible of severance ; and this is the rule, even if the defendants sever in pleading, or one suffer judgment by default, if there be but one trespass, of which both are found guilty ;(*m*) and if the plaintiff collect the whole damages of one, that one cannot compel the others to contribute.(*n*) But, it was held in one case, that if a party recover damages, in case, against one of two joint coach proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he prove that he was not present when the accident occurred.(*o*) Where there are several defendants, one or more of whom join issue, and the others either confess the action, generally, thus leaving the damages to be assessed, or where they demur and have judgment against them, or do not plead at all, so that no issue is joined as to them ; in this, or the like cases, where a jury is demanded for trial, the damages should still be assessed all at one time, and the venire should run in these words, "*as well to try the issue joined, as to enquire of the damages, between James Jackson, plaintiff, and A. B. C. D. and E. defendants.*" In such cases the jury, where those who plead are acquitted, may, in an action for a tort, assess damages against the others. And it is the nature of a tort, that one defendant may be found guilty, and another acquitted, according to the truth of the case, excepting the instance noticed ante, 816. But this is generally otherwise in assumpsit, covenant and other actions, sounding in contract, where the plea of one, if found true, shall acquit all, even though the others do not plead, or where they have judgment pass against them upon demurrer ; for, in these cases, the plea generally goes to the whole

(*k*) Vid. 2 Williams' Saund. 171. 5 Burr. 2790. 6 T. R. 199.

(*l*) Ante, 946.

(*m*) 6 Cowen, 313.

(*n*) 8 T. R. 186.

(*o*) 2 Carr. & Payne, 417.

cause of action. Yet to this there are exceptions, as where one pleads the insolvent act, bankruptcy, infancy, or other defence merely personal in its nature.(p) Here, though the plea be found true, it is a defence strictly confined to the person who pleads it; and does not go, like defences in most other cases, to destroy the right of action in respect to all the defendants.(q) And in actions for a wrong, the justice or jury may find one defendant guilty of the trespass at one time, and the other at another; or one of them guilty of part of the trespass or trover, and the other of another; or some guilty of the whole trespass, and the others guilty of part only; in all which cases, several damages are to be assessed.(r)

(p) 3 Caines, 4. 2 John. 279. 5 id. 160.

(r) Vid. Grab. Prac. 2d ed. 320, and cases there cited.

(q) Vid. Bac. Abr. tit. Damages,(d) 4.

CHAPTER XII.

Of Judgment.

A justice having no power to arrest a judgment or award a new trial, (a) the next subject I shall consider is the different kinds of judgment he is to give upon the various matters litigated before him, premising, however, that in whatever language or form the judgment may be given, the law will, notwithstanding, consider what should have been the judgment in the given case, and ascribe the proper effect to it, whether it be worded or conceived in proper form or not. (b) Thus, where a justice waited the four days, and then gave judgment of nonsuit against the plaintiff, not having a right so to do, the supreme court considered it the same as though a judgment on the merits had been rendered, and held it a bar to another suit. (c) So, where no judgment was rendered by the justice on the verdict of a jury, the supreme court considered what ought to be done in this respect, as done, overlooking this lack of form, and making the verdict a bar to a subsequent suit. (d) And so, by parity of reasoning, where a final judgment, as on the merits, is given, when it ought to be a nonsuit, &c., it can only have the effect of a nonsuit, whatever the magistrate may call it.

It is then material to consider the different kinds of judgment, in order to determine their nature and operation only ; without regard to the form of their entry, which is seldom preserved in practice among the proceedings of the justice, except, perhaps, when he sets it forth in a return to a writ of certiorari.

Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record. This record is drawn up with a good deal of formality in the higher courts, and sets forth the pleadings, continuances, jury process, verdict, judgment, &c., and though the form

(a) 2 John. 181.
(b) 10 Wen. 519, 522.

(c) 11 John. 457. 10 Wen. 619. Vid. ante, 726, 878, 902.
(d) 2 John. 181, 191.

is hardly known in a justice's court, yet the substantial rules of proceeding therein, rest upon the same principles as in the highest courts of common law. These judgments are of five sorts. 1. Where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon *demurrer*. 2. Where the law is admitted by the parties, and the facts disputed; as in case of judgment upon a *verdict*, or *the finding of facts by the justice*. 3. Where both the fact, and the law arising thereon are admitted by the defendant, which is the case of a judgment by *confession*; *default*, properly speaking, being inapplicable to a justice's court.^(e) 4. Where the plaintiff is convinced that either the facts, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution, which is the case in judgments upon a *nonsuit* or *retraxit*, &c.; or, 5, and lastly, where from some facts elicited upon the trial, or some proceedings taken by either of the parties, the justice's jurisdiction ceases, as in the case of a judgment of *discontinuance*, upon its appearing that the justice is a material witness, or that the amount of the claims of both parties exceeds \$400, &c.

The judgment, though pronounced or awarded by the justice, is not his determination or sentence, but the determination or sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact which stand in the syllogistic form, noticed ante, 834, while speaking of demurrers and issues.^(f) This judgment cannot be rendered on Sunday, although the verdict of a jury, empanelled before Sunday commenced, may be received on that day.^(g)

1. Suppose the defendant demurs to my whole declaration, or to any single count of my declaration, and I join in demurrer; the justice gives a *judgment* that my declaration or count is *sufficient*, or *insufficient in law*; if there be an issue of fact upon some of the counts, he gives a separate judgment upon the count demurred to, that it is *sufficient* or *insufficient*, and then goes on to try and decide the issue of *fact*, thus rendering two separate judgments in the cause; and so, if any other pleading in the cause be demurred to, or one pleading questioned by demurrer, and the other taken issue upon, as to the fact; for all the issues, both of law and fact, must be disposed of by the proper judgment.

2. Several issues of fact may also be joined in a cause, upon different counts, or upon different pleas, on some of which a verdict or judgment may pass for the plaintiff, and upon some for the defendant; as where

(e) Vid. ante, 878.

(f) And vid. 3 Bl. Comm. 395, 6.

(g) 15 John. 119. Ante, 493.

several different pleas are interposed to, and issues joined upon, different counts in the declaration.

It is provided by statute, that judgment for the defendant, with costs, shall be rendered whenever a trial has been had, and it be found by verdict, or by the decision of the justice, that the plaintiff has no cause of action against the defendant; and if upon the trial of the cause, or upon an *ex parte* hearing, in those cases where it may be had upon the defendant's failing to appear, a sum, in debt or damages, shall be found in favor of the plaintiff, then judgment shall be rendered against the defendant for such debt or damages, and the costs. *(h)*

There is no such thing in a justice's court, as a judgment by default against the defendant. His absence at the return day of the process, or at the adjourned day, is not construed into a confession of any thing. But the justice must, in such case, first waiting for the plaintiff to appear, (which is essential,) *(i)* proceed at the very place mentioned in the process, *(j)* or appointed by the adjournment, *(k)* and hear the proofs and allegations of the plaintiff, and determine the same in the same manner as if an issue were joined. *(l)* And in one case, where it did not appear in the return to a certiorari, that the summons contained any time or place of appearance, judgment was for this reason reversed. *(m)* Where the defendant, however, neglects to appear at the return day of the process, and the justice has adjourned the cause to another day, *(n)* the defendant is then precluded from giving any evidence on his part, except in mitigation of damages, and this he may do at any time before the cause is finally submitted, but he has no right to introduce or prove any matter which would be the proper subject of a plea. But the defendant will be permitted to plead, if he appear on the return day of process, before adjournment, or after adjournment, if the plaintiff be present in court, or at any time before the closing of the plaintiff's case, if he proceed to trial on the return day. *(o)* And where an issue has been joined, and the cause adjourned, if the defendant appear at the adjourned day, at any time before the cause is finally submitted, though the trial may have progressed, and the plaintiff may have closed his case, yet he may go into his full defence upon the issue joined, the same as though he had appeared in the first instance. *(p)* And in a late case it was held that a justice might, in his discretion, upon terms, permit a defendant to come in and plead, who

(h) 2 R. S. 176, § 120, 1.

(i) 9 John. 140; and vid. ante, 534, 5.

(j) 1 John. Cas. 243. 12 John. 417.

(k) 1 Cowen, 112.

(l) 2 R. S. 173, § 92.

(m) 17 Wen. 517.

(n) 11 John. 69.

(o) 12 Wen. 150. 15 John. 86.

(p) 16 John. 180. 12 Wen. 150.

did not appear on the return of a summons personally served, but subsequently appeared on the day to which the cause was adjourned at the request of the plaintiff.^(q)

3. *Judgments by confession.* The following are the provisions of the revised statutes in relation to judgments by confession.^(r) A justice of the peace may enter a judgment, by confession of the defendant, in any case where the debt or damages confessed, shall not exceed two hundred and fifty dollars, with such stay of execution as may be agreed on by the parties interested in such judgment. No confession shall be taken, or judgment rendered thereon, unless the following requisites be complied with: 1. The defendant must personally appear before the justice: 2. The confession shall be in writing, signed by the defendant, and filed with the justice: 3. If the judgment be confessed for a sum exceeding fifty dollars, the confession shall be accompanied by the affidavit of the defendant and plaintiff, stating that such defendant is honestly and justly indebted to the plaintiff in the sum named in such affidavit, over and above all just demands which he has against him, and that such confession is not made or taken with a view to defraud any creditor. Every judgment confessed without a compliance with the above provisions, is void as against all persons, except a purchaser in good faith of any goods or chattels, lands or tenements, under such judgment, and except the defendant making such confession.

The above statute does not demand the appearance of the plaintiff, as one of the requisites to be complied with, in order that the judgment rendered upon the confession shall be valid: and the want of such appearance can not be taken advantage of by the defendant, at least, he having by his confession, waived any right he may have had to object on that account. And the plaintiff is probably, in such case, bound by the judgment, only so far as he expressly or impliedly, (by leaving with the justice a statement of his demand,) authorized him to receive a confession, and enter judgment. He would not, at least, in case of a confession for a less sum than was his due, be bound to receive it in satisfaction of his whole debt.^(s)

The statute is probably applicable to all confessions, whether made after suit commenced, or voluntarily, without process. There is nothing in its language, at least, to negative such an inference, nor has there been since the passage of the act, any decision defining the extent of its operation. The safer course will therefore be, to follow strictly the requisites

(q) 21 Wen. 454. And vid. ante, (r) 2 R. S. 175, § 113, 114, 115.
848, 526 to 531. (s) Vid. ante, 534, 5.

of the statute ; as well where the confession is made after suit commenced, as in cases of voluntary appearance before the justice. The confession ought, in strictness, to say whether the damages confessed arose upon tort or contract, in order that the justice may know whether the execution to be issued on the judgment, should contain a clause authorizing an arrest.

Form of confession of judgment.

To *Ransom Cook*, Esquire, one of the justices of the peace of the county of Saratoga.

I do hereby confess judgment, on a demand arising upon contract, (or tort) in favor of *John Doe*, for the sum of *fifty* dollars damages, (or, "debt") besides costs, and authorize you to enter judgment against me accordingly. Dated at Saratoga Springs, in said county, the 1st day of December, 1840.

JAMES JACKSON.

In presence of

RANSOM COOK, *Justice*.

If the debtor consent to the issuing of execution within the time limited by statute, he should add at the end of the above confession, "and consent that execution issue *immediately*," or, "*after twenty days*," according to the time agreed on. The confession should be for a specific sum. A judgment entered on such a sum as A. and B. should award, is bad, the confession being made before the award is declared ; for a justice has no power to enter a confession for an uncertain and unliquidated amount.(t) But a confession for the amount of a note described, so as to be capable of being identified, or for a sum to be ascertained by calculation, would probably be good.(u) A confession for such a demand as the plaintiff shall present to the justice is revocable, at any time before judgment entered thereon.(v)

Affidavit where confession is for a sum exceeding fifty dollars.

SARATOGA COUNTY, ss: We *John Doe* and *James Jackson*, the parties named in the foregoing (or annexed) confession of judgment, being duly sworn, severally say, that the said *James Jackson*, is honestly and justly indebted to the said *John Doe*, in the sum of one hundred dollars,

(t) 4 John 423.

(u) Vid. Edw. Treat. 3d ed. 115.

(v) 3 John. 147

over and above all just demands, which the said *James Jackson* has against the said *John Doe*, and that the above (or, *annexed*) confession is not made or taken with a view to defraud any creditor.

JOHN DOE.

JAMES JACKSON.

Subscribed and sworn before me, this }
1st day of December, 1840. }

RANSOM COOK, *Justice*.

This affidavit should be taken by the justice before whom the confession is made, and by no other officer; and if there are more than one plaintiff or defendant, it should, in strictness, be made by all of them; though perhaps this is not necessary in all cases.^(w) Within the principle of the case of *Cornell v. Cook*,^(x) it would probably be regular under the statutes now in force, for a creditor, having a demand exceeding fifty dollars, to take from his debtor several confessions, each for a sum less than fifty dollars, to the full amount of his claim, and thus avoid the necessity of making the affidavit required by the statute.

4. *Judgment of nonsuit*, with costs, is to be rendered against a plaintiff in the following cases: 1. If he discontinue or withdraw his action: 2. If he fail to appear on the return of any process within one hour after the same was returnable: 3. If, after an adjournment, he fail to appear within one hour after the time to which the adjournment shall have been made: 4. If he become nonsuited on the trial: 5. If he shall not appear on the coming in of the jury to hear their verdict.^(y)

We have seen how far the rule requiring the justice to nonsuit the plaintiff, if he fail to appear within the time prescribed by the process or adjournment, has been relaxed.^(z) When the justice should nonsuit him for insufficiency of evidence, and at what time he should voluntarily submit to a nonsuit in case he elect so to do on account of the failure of his proof, and in order to prevent a judgment against him which would be a bar to a subsequent action, *vid. ante*, 879, 880, 896.

5. *Judgment of discontinuance*, which is a mere suspension of the proceedings without affecting the merits of the action, is rendered in several cases specified by statute, as where a justice is a material witness;^(a) or where the defendant's set off exceeds the plaintiff's claim by more than fifty dollars, and he does not require it to be set off;^(b) or where it appears on the trial of a cause that the total amount of the plaintiff's de-

(w) *Vid. Edw. Treat.* 3d ed. 115.

(x) 7 Cowen, 310.

(y) 2 R. S. 176, § 119.

(z) *Ante*, 526, 528, 847, 848.

(a) 2 R. S. 176, § 118, and *vid. ante*, 266.

(b) 2 R. S. 167, § 53. *Ante*, 745, 746.

mand and defendant's set off exceeds four hundred dollars ;(c) or where a question of title to land arises from the plaintiff's own showing.(d) In all these instances, except the first, the judgment is for the defendant with costs. There are other cases where the proceedings are discontinued, but where no judgment is rendered against either party for damages or costs, as where the defendant interposes a plea of title ;(e) or the justice, after the issuing of process, discovers his relationship to one of the parties ;(f) or where he is absent on the day of trial ;(g) and other instances which have been noticed in the preceding pages under their several heads.

The judgments we have been considering, are, generally, final, and may be pleaded in bar to a new action brought to litigate the same matter over again.(h) The only exceptions which occur to me are, a judgment rendered against the plaintiff upon *demurrer*, for some defect in his pleading ; or upon a plea in *abatement* ; or judgment of *nonsuit*, or *non pros* ; or *discontinuance*.(i) It is only where the cause is decided upon the merits of the controversy that the judgment is a bar ; thus, where a party fails by misconceiving his action ; or by suing as executor when he was administrator ; or on account of defects in pleading ; or temporary personal disability, as infancy or the like ; or because the debt was not due at the commencement of the suit, and for other similar causes which are sufficient to throw the cause out of court, but do not affect the foundation of the action, the judgment rendered against the plaintiff is no bar to a second suit.(j) But where a cause has once been submitted to a justice or jury and passed upon by them, it is a bar to a subsequent action, whether a judgment ever be entered on the verdict or not, if the cause be tried by a jury ; or whether the justice, if the cause be submitted to him, ever give a judgment upon it or not. And the particular form of the judgment will not vary its effect, as where the verdict was *no cause of action* in one case, and in another the justice gave judgment of *nonsuit* after the submission of the cause, the proceeding was held a bar.(k) But the justice's docket cannot be contradicted, by parol evidence, to show that the cause was decided upon the merits, when the docket shows a judgment of *nonsuit*.(l)

Again, judgments are either *interlocutory* or *final*.

1. *Interlocutory* judgments, are such as are given upon some plea or

(c) 2 R. S. 167, § 54. Ante, 746.

(d) 2 R. S. 168, § 63. Ante, 819.

(e) Ante, 826.

(f) Ante, 877. 21 Wen. 63.

(g) Ante, 528.

(h) Vid. ante, 724, 727.

(i) Vid. 6 John. 199.

(j) Vid. Cowen & Hill's Notes to Phil. Ev. 834, 5, 6.

(k) Ante, 726. 10 Wen. 519.

(l) 7 Wen. 103.

proceeding, which is only intermediate, and does not finally determine or complete the suit. Thus, upon a plea in abatement, if the plaintiff take issue thereupon, and it is found in his favor, the judgment is *final*, that he recover.(*m*) But if an issue of *nul tiel record* be found against the defendant upon a plea in abatement;(n) or, if the plaintiff demur to the defendant's plea in abatement;(o) or the defendant demur to the plaintiff's replication thereto, and in either case, the issue in law, is decided in favor of the plaintiff,(p) judgment of *respondeas ouster*, that is that the defendant *answer over*, is given, in which case he must plead *de novo*. It is easy to observe, that the judgment here given, is not final, but merely interlocutory; for there are afterwards further proceedings to be had, when the defendant hath put in a further answer.(q) But a judgment in favor of the plaintiff, on an issue of fact joined upon a plea in abatement, in a justice's court, is final, and even shuts out the defendant's set off.(r)

2. *Final judgments* are such, as at once put an end to the action, by declaring, that the plaintiff has either entitled himself or has not, to recover the claim he sues for.(s)

In all cases of final judgment, rendered by a justice, it is peremptory, and collectable of the proper goods and chattels of the defendant, or the plaintiff. Even where the plaintiff sued as administrator, and the defendant overbalanced him in the suit by a set off against his intestate, it was formerly held that the judgment was collectable of the plaintiff's proper goods, and not, as at common law, of the goods of his intestate.(t) But it is now provided by statute that whenever a set off is established in a suit brought by executors or administrators, the judgment shall be against them in their representative capacity, and shall be evidence of a debt established, to be paid in the course of administration, but execution shall not issue thereon, until directed by the surrogate who granted letters testamentary or of administration.(u)

In cases where a plaintiff is nonsuited, discontinues or withdraws his action; and where judgment shall be confessed; and in all cases where a verdict is rendered, or the defendant is in custody at the time of hearing the cause, the justice must forthwith render judgment, and enter the same in his docket. In all other cases he must render judgment, and en-

(m) 2 Saund. 210, n. 3. 1 East, 544.
2 Wils. 368.

(n) 1 John. Cas. 398. Coleman, 98,
S. C.

(o) 2 Saund. 210, n. 3. 1 Bac. Abr. 228.
30. 2 Wils. 368.

(p) 1 East, 542.

(q) 3 Bl. Comm. 396, 7.

(r) 12 John. 205.

(s) 3 Bl. Comm. 396, 7.

(t) 10 John. 366, and vid. 1 John. Cas.

(u)

2 R. S. 167, § 56.

ter the same in his docket, within four days after the cause shall have been submitted to him for his final decision.(v) And in no case can a justice amend his judgment after he has entered and declared it, though he have committed a clerical error in the computation of the amount.(w) The four days in which a justice shall render judgment are to be computed according to the rules laid down, ante 262, 3, excluding the day of trial; and if the fourth day thereafter is Sunday, judgment must be rendered the day preceding.(x)

It is the duty of a justice, on the demand of any person in whose favor he may have rendered a judgment for above twenty five dollars, exclusive of costs, to give a transcript of such judgment, together with the original bond of security for stay of execution, if there be such bond; and from the time of filing such transcript and bond, and the docketing of such judgment in the office of the county clerk, such judgment shall be a lien upon the land of the defendant within the county, in the same manner and with like effect as if it had been rendered in the court of common pleas; and may in the same manner be discharged and cancelled.(y)

The statute requires every justice's docket to contain, 1. The titles of all causes commenced before him: 2. The time when the first process was issued against the defendant, and the particular process issued: 3. The time when the parties appeared before him, either without process, or upon the return of process: 4. Where the pleadings are made orally, a concise statement of the declaration of the plaintiff, the plea of the defendant, the further pleadings of the parties, if any, and the issue joined: 5. Every adjournment, stating on whose motion, and to what time and place: 6. The issuing of a venire, stating at whose request, and the time and place of its return: 7. The time when a trial was had, the names of the jurors returned summoned, who did not appear, and the fines imposed on them, if any: 8. The names of the jurors who appeared, and of the jurors who were sworn; the names of the witnesses sworn at the request of either party, stating at whose request, the objections, if any, made to the competency of a witness, and the decision thereon: 9. The verdict of the jury, and when received: 10. The judgment rendered by the justice, and the time of rendering the same: 11. The time of issuing execution and the name of the officer to whom delivered; and if issued upon the application of any party, before the time when the same should regularly issue, such fact shall be noted, and

(v) 2 R.S. 177, § 124. 10 Wend. 519.
19 Id. 371.

(w) 18 Wend. 558.

(x) 7 Cowen, 147.

(y) 2 R. S. 177, § 127, 8. Vid. post,
Execution.

the nature of the proof given : 12. The return of every execution, and when made ; and every renewal of an execution made by him, with the date of such renewal : 13. The fact of his having given a transcript of the judgment, to be filed in the clerk's office, and the time when the same was given : 14. The fact of a certiorari having been brought on any judgment rendered by him, and the time of the service of the same : 15. The fact of an appeal having been made from any judgment rendered by him, and the time when made.(z) The above items are to be entered under the title of each cause to which they relate, and in addition, the justice may enter any other proceeding before him in the cause, which he may think useful.(a)

The following forms will give the justice some idea of the manner in which his docket should be kept.

Form of entries in the docket where the cause is tried by a jury.

James Jackson }
vs.
Richard Roe. }

Jan. 1st, 1841, summons issued, returnable 13th inst. 1 P. M. at my office. Jan. 13th, summons returned, personally served by Geo. C. Loomis, const. on the 2nd. inst. fees, 12½ cts. Jan. 13th. Parties appear—plff. by F. Hoag, who swears to his authority. Plff. declares against the deft. in assumpsit, for goods, wares and merchandize, sold by plff. to deft. at his request, at Saratoga Springs, in 1840—claims \$50 damages. Deft. pleads the general issue and gives notice of set off for goods, &c. sold to plff., money lent, paid out, had and received—claims a balance of \$50. On motion and oath of defendant, cause adjourned to 20th inst., 1 P. M., at my office. Issued venire at plff's request, returnable at the time and place last mentioned. Jan. 20th, parties appear and proceed to the trial of the cause. The following jurors returned summoned upon the venire, by Geo. C. Loomis, const. viz. Robert M'Donnell, Peter V. Wiggins, Horace Fonda, Daniel Snyder, Clement Winston, Joel Clement, Luther Munger, Joshua T. Blanchard, James M. Marvin, Samuel C. West, Ezra Hall and Washington Putnam, of whom all appeared except the three first named. The six last named sworn as jurors to try the cause. John Doe, James Smith and John Brown sworn as witnesses for the plaintiff. Thomas Noakes sworn as a witness for the defendant. John Styles offered as a witness on the part

(z) 2 R. S. 195, § 243.

(b) 9 Cowen, 233. 6 Wend. 215, S.

(a) Id. 196, § 244. Vid. ante, 926, 7. C. and Vid. 9 Cowen 182.

of the plff.—objected to by the deft. on the ground of interest and rejected. After hearing the testimony, the jury retired under the charge of Geo. C. Loomis, const. duly sworn for that purpose, and found a verdict in favor of the plff. for ten dollars damages, which was received on the day last mentioned. Whereupon I immediately returned judgment for

Damages,	\$10,00
Costs,	4,00
	<hr/>
	\$14,00

Jan. 20th. Execution issued to Geo. C. Loomis, const. on the oath of plff. that he will be in danger of losing his judgment by waiting 30 days, stating circumstances which are satisfactory to me. Jan. 28th, execution returned satisfied.

Form of entry of judgment by confession for less than fifty dollars.

John Doe
vs.
Richard Roe. }

Jan. 1st, 1841, Parties appear and judgment entered against the deft. on a demand arising upon contract, on his confession in writing, for

Damages	\$25,00
Costs,	47
	<hr/>
	\$25,47

Same for a sum exceeding fifty dollars.

James Smith
vs.
John Styles. }

Jan. 1st 1841, Parties appear and judgment entered against the deft. on a demand arising upon contract, on his confession in writing, accompanied by the affidavit of the defendant and plaintiff, as required by the statute, for

Damages,	\$250,00
Costs,	62
	<hr/>
	\$250,62

It is not necessary to make a literal transcript or copy of all the proceedings in the cause, as entered in the docket, in order to make the judgment, when filed and docketed with the county clerk, a lien upon land. The following form was held sufficient under the old act, which was substantially similar to the statute now in force.(b)

(b) 9 Cowen, 233. 6 Wen. 213, S. C. And vid. 9 Cowen, 182.

ONEIDA COUNTY—JUSTICE'S COURT.

Jesse Hills
v.
Daniel Gridley. } March 24, 1820.

Judgment rendered for plaintiff for the sum of	\$49 64
Costs, - - - - -	1 18
	<hr/> \$50 82

Costs of copy to be added.

I certify the above to be a true copy of a judgment on record in my office. Dated April 3d, 1820.

SAMUEL WETMORE, *Just. of Peace.*

But the better plan, is to make a full and literal copy of the docket, and add a certificate in the following form:

SARATOGA COUNTY, ss. I certify that the above is a transcript from my docket. Dated December 2d, 1840.

RANSOM COOK, *Justice.*

This transcript may be made after the expiration of the justice's term of office ;(c) and is good, although in bad English, if intelligible in its essential parts ;(d) and although it does not show on its face that the justice had jurisdiction ; for the transcript is *prima facie* evidence of that fact, and of the otherwise regular rendition of the judgment.(e) If the justice refuse to give a transcript, a mandamus will lie against him.(f) After the filing of the transcript, all 'control over the judgment, on the part of the magistrate, ceases ;(g) and where a transcript had been filed and execution issued thereon, the allowance of an appeal on the judgment, was held to operate as a supersedeas.(h)

The provisions of the statute in relation to making justices' judgments a lien upon land, do not probably apply to judgments rendered in suits commenced by attachment, where the defendant is not personally served with the attachment or summons, and does not appear ; for it is provided, that in that case, the judgment is only presumptive evidence of indebtedness, and may be repelled by the defendant, and that no execution issued thereon shall be levied upon any other property than such as was seized

(c) 8 Wen. 393.

(d) 7 id. 388.

(e) 6 id. 666. 9 Cowen, 182. Id. 223.

(f) 8 Cowen, 133.

(g) 2 R. S. 182, § 162.

(h) 2 Cowen, 506.

under the attachment.(i) And it is doubtful whether an action will lie on a judgment in a suit commenced by attachment, until the attached property is exhausted by execution.(j)

In relation to judgments against joint debtors, it is provided by statute that, if process shall have been issued against two or more persons jointly indebted, and shall have been personally served upon either of the defendants, the defendant who may have been served with process, shall answer to the plaintiff; and the judgment, in such case, if rendered in favor of the plaintiff, shall be against all the defendants, in the same manner as if all had been served with process; such judgment shall be conclusive evidence of the liability of the defendant who was personally served with process in the suit, or who appeared therein; but, against every other defendant, it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence.(k) We have already remarked upon this statute, ante, 497, 8, 9.

All judgments bear interest from the time of their rendition, and if rendered on contract, the interest may be collected in the execution; but if rendered for a tort, it is only recoverable by action on the judgment.(l)

(i) 2 R. S. 203, § 298. Vid. Prac. Directions under Non. Imp. Act, Pamph. p. 28, 9.

(j) 20 Wen. 148.

(k) 2 R. S. 176, 7, § 122, 3.

(l) 3 Wen. 496. 2 R. S. 288, § 9 12 Wen. 101. Ante, 1001.

CHAPTER XIII.

Of the Costs.

THE judgment being determined on, in the mind of the justice, the next subject in the order of consideration, will be the costs of the suit. It is provided by statute, that whenever a judgment shall be rendered by a justice against a party, it shall be with the costs of suit; but the whole amount of all the items of such costs, (except charges for the attendance of witnesses from another county,) shall not, in any case, exceed five dollars.(m) Costs are not given to a defendant upon judgment in his favor on a plea of misnomer, nor upon the discontinuance which follows the defendant's putting in a plea of title, but are given, where a question of title arises from the plaintiff's own showing.(n) So, costs are not given, where judgment of discontinuance is rendered by reason of the justice being a material witness.(o) And wherever there is no judgment rendered against either party, but a mere discontinuance of proceedings; as where the justice is absent at the day of trial, or discontinues the suit on account of his relationship to one of the parties, each party pays his own costs. If the plaintiff be found indebted to the defendant, or the defendant to the plaintiff, judgment is to follow, in favor of the successful party, for the debt or damages, and costs; and in all cases where a debt or damages are recoverable, costs are given of course, without regard to the nature of the action, or the character in which the parties sue or are sued.(p)

The costs here spoken of, and for which judgment is given, are the costs which the *prevailing party* is entitled to recover, according to the statute, taking no notice of the costs of the losing party.(q) But no judgment will be reversed, on account of any fees having been improperly allowed by the justice;(r) nor because the total amount of costs exceeded

(m) 2 R. S. 177, § 126.
(n) Id. 168, § 61, 63; 513, § 30.
(o) 2 R. S. 176, § 118. *Laws of 1838*,
p. 232, § 1.

(p) 2 R. S. 176, § 120, l. 1 John.
317, per Kent, C. J.
(q) Penning. on Sm. Causes, 181.
(r) 2 R. S. 185, § 184.

five dollars ;(s) the remedy by the party who has paid them being by action against the party who has received them, in which he may recover the amount of the fees improperly paid, with interest.(t)

As to the effect that a tender, either before or after suit brought, or the payment of money into court, has upon the question of costs, *vid. ante*, 789, 791, 793, 809, 812, 813, 814.

The plaintiff, sometimes, is entitled to recover *double* or *treble costs*; and formerly, whenever a statute gave him *double* or *treble damages*, he was entitled to have his *costs doubled* or *trebled*, though the statute said nothing of the *costs*, by that name or title. An example of this, was in the act concerning trespasses on land.(u) But now, whenever a plaintiff is entitled to recover double or treble the damages assessed in his favor, he can recover only single costs in such suit, except in cases otherwise specially provided for by law.(v) Double and treble costs are also many times to be taxed for the defendant, and particularly in actions against officers, and officers or others, acting under the authority of some statute, as mentioned *ante*, 698, n. (1)(w), as well as in many cases scattered through the statute book, by particular provision; as officers of the militia,(x) &c. &c. Double and treble costs were formerly understood to mean the costs of the party, literally doubled or trebled; but double costs are now defined to be, the amount of the party's costs, and one-half in addition; and treble costs are common costs, with three-fourths, or seventy-five per cent in addition.(y) It is decided, also, that a party, in order to be entitled to double or treble costs, must recover upon the whole record, and where one issue is found for, and another against him, he is entitled to single costs only.(z) In courts of record, double or treble costs are only allowed upon motion to the court;(a) and an application to the justice is probably necessary at the time of the trial or the rendition of judgment, in order to entitle a party to collect double or treble costs. Double or treble costs, when recovered, belong to the party, and not to the officers of the court, or witnesses, or jurors.(b) But where the party in the process, for acting under which an officer was sued, indemnified the officer, or assumed the defence of the suit, he, and not the officer, was held to be entitled to double costs.(c) Where an officer is sued jointly with another, and they plead jointly, the officer is entitled to

(s) 21 Wen. 305. 19 id. 351.

(t) 2 R. S. 193, § 230.

(u) 1 R. L. of 1813, p. 525. 8 John. 342. 14 id. 328.

(v) 2 R. S. 512, § 24.

(w) And *vid. id.* 512, § 25. 13 Wen. 230.

(x) 2 R. S. 317, § 6.

(y) *Id.* 512, § 25. 9 Wen. 443.

(z) 12 Wen. 285.

(a) 4 id. 216.

(b) 2 R. S. 512, § 26.

(c) 6 Wen. 297.

single costs only, although judgment be in favor of both; but where they sever in their defence, and plead separately, the officer, in case judgment goes in his favor, is entitled to his double costs.(d)

The following are the fees for services as allowed by the revised statutes.(e)

JUSTICES' FEES.

Summons, - - - - - \$0 09

(In a judgment against the defendant, no more than two summonses and the service of two summonses shall be included in the costs.)

Warrant, - - - - - 12½

Attachment, or Execution, - - - - - 19

Each adjournment, except such as shall be made by the justice, without the motion of either party, . - - - 09

Subpœna, . - - - - - 06

Administering each oath, - - - - - 06

Filing every paper required to be filed with him, - - - 03

(But no fee shall be allowed for filing any written declaration, plea, or other written pleading, or for filing any process issued in any cause.)

Venire, - - - - - 19

Swearing a jury, - - - - - 12½

Entering a judgment, - - - - - 25

Transcript of a judgment, - - - - - 25

Every bond or other written security, if drafted by the justice, 25

Return to a writ of certiorari,(f) - - - - - 2 00

Return to an appeal,(1) - - - - - 75

WITNESSES' FEES.

Every witness subpœnaed and attending from the same county, for each day's attendance, - - - - - 12½

Every witness attending from out the county, for each day, 25

CONSTABLES' FEES.

Serving a warrant or summons, - - - - - 12½

Copy of every summons delivered on request, or left at the dwelling of the defendant in his absence, - - - - - 09

(d) 2 Cowen, 426. 6 John. 109. 1 Hall's Sup'r Court R. 421.

(e) 2 R. S. 192, § 228.

(f) Id. 184, § 175.

(1) 2 R. S. 187, § 190.

Serving an attachment, - - - - -	50
Copy of an attachment and of the inventory of the property seized, left at the last residence of the defendant, - -	50
Serving an execution, for every dollar collected to the amount of fifty dollars, - - - - -	05
Every dollar collected over fifty dollars, - - - - -	02½
Every mile going only, more than one mile, when serving a summons, warrant, attachment, or execution, (to be computed from the place of the abode of the defendant, or where he shall be found, to the place where the precept is returnable,) - - - - -	06
Notifying a plaintiff of the service of a warrant, - - -	12½
Going to the plaintiff's residence, or where such notice was served, for every mile more than one, - - -	06
Summoning a jury, - - - - -	50

JURORS' FEES.

Each juror attending to serve as such, although not sworn, - - -	06
Each juror attending and trying a cause, - - - - -	12½

OTHER FEES.

To a constable, or other person, for serving a subpoena, for each witness served, - - - - -	12½
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(But no allowance shall be made in any judgment, for service upon more than four witnesses in any cause.)

The same fees, and no others, are allowed to sheriffs, for serving executions issued by the clerk of the court of common pleas, upon the judgment of a justice, as are allowed to constables in like cases.(g)

The constable is entitled to his poundage upon an execution, though he merely levy on property, and the parties compromise without a sale; and although the property levied on was covered with liens previous to the judgment, to an amount exceeding its value:(h) the fees to be computed according to the amount of property levied on; but not where he has levied on property, and returned that it remains on his hands for want of buyers; to entitle him to fees, he must levy the money, except where he is prevented by the act of the plaintiff or the operation of law: in the former case he may recover his fees, though he have levied only,

(g) 2 R. S. 196, § 229.

(h) 1 Caines, 192. 17 Wen. 14. 9 id. 485.

and not sold.(i) And he is entitled to his full fees immediately, on taking the defendant's body.(j) But where he has not actually served the execution, by a levy or arrest, and a compromise or payment is made between the parties, of which he has notice, of course, nothing is due to him, for he has done nothing officially. The constable cannot charge mileage for service of process on each of several defendants, where they all reside at the same place.(k)

A justice is not liable to be sued by a witness for his fees, although he may have received them. The witness should look to the party subpoenaing him, and the justice is accountable over to the party. In the witness' action against the party, he can recover the statute fees only, and nothing more, even though he be a foreign witness.(l)

Under the statute of costs relating to courts of record, it is the constant practice to tax fees for those *prospective* services ordinarily necessary in the perfecting and collection of the judgment; such as the record, execution and return of the same, all of which are, however, deducted on settling the judgment, provided they are not afterwards, in fact, performed.(m) And this is the only way, in a justice's court, in which the plaintiff can recover his full costs; for the judgment for costs can never be increased to meet the subsequent services, by any act of the justice. Accordingly, the fees for those services which must, in all probability, be performed, ought, doubtless, to be taxed prospectively. Thus, fees for the execution in all cases, and the oath to procure the execution, where it is necessary to be sworn out, the clerk's fees, and fees for a transcript, where the judgment may be made a lien on real estate, &c., are proper subjects of taxation within this rule; and I do not see how the statute, authorizing the party to recover his costs, can be carried into effect in any other way.

Where a judgment of nonsuit is rendered by the justice, but no costs awarded, it is incapable either of affirmance or reversal; and, on certiorari, the supreme court will give no judgment one way or the other.(n) But it is otherwise, where any costs are awarded; for in the latter case, a certiorari will lie.(o)

(i) 2 Cowen, 421.

(j) 5 John. 252.

(k) 1 Wen. 104.

(l) 14 John. 357. Ante, 861.

(m) 2 R. S. 542, § 10.

(n) 2 John. 8.

(o) Id. 9.

CHAPTER XIV.

Of Staying Proceedings.

A justice has no authority or discretion to stay proceedings in a cause, or dismiss the suit, where the plaintiff has been nonsuited in a suit brought for the same cause of action, because the costs of the former action are unpaid.(p)

But where judgment is obtained before a justice, against the sheriff, for a negligent escape from the jail liberties, where a bond for the liberties has been given, the justice may stay the proceedings in the cause, until the defendant has a reasonable time to proceed by suit against the bail.(q)

This should be on application and oath of the defendant, or some person in his behalf, acquainted with the facts, and had better be an affidavit in writing, stating the grounds of the motion, due notice being given to the opposite party, that the application will be made. Or, it may be on oath administered, *to make true answers to such questions as shall be put, touching the propriety of staying proceedings in the cause.* It should appear, on oath, how much the penalty of the bond amounts to, in order to determine the length of time necessary to collect it, which depends on the question whether it be collectable in a justice's court, or only in a court of record. If in a justice's court, the time for collection would, of course, be shorter than in a court of record. Should the justice, however, on the first motion, fail to allow sufficient time, he could extend it on another application, always requiring the defendant to exercise due diligence, according to the course of the court in which he sues.

If the plaintiff is not present when the defendant makes his application, he should draw up his affidavit, swear to it before the magistrate who tried the cause, serve a copy of it on the opposite party, with notice of the time and place of the motion to stay proceedings, for such time as the justice shall direct. This, in the supreme court, would be a four-

(p) 10 John. 363.

(q) 2 R. S. 355, § 62. 9 John. 369.

day notice. He should then make affidavit of having served the copy and notice, before the same justice, or prove it by parol before the justice, on the day of the motion, unless the party appears and admits the service, and the justice will then determine what time the proceedings are to stay, unless good cause is shown against the motion by the opposite party.

In *McIntire v. Woods*, Sheriff of Washington, (r) a judgment was obtained against the defendant, in the supreme court, in August term, 1809. In February term, 1810, application was made to stay proceedings, till November term following. This would give the sheriff a chance for a trial at the Washington circuit in June, 1810, a judgment at the following August term, and an execution against the property of the bail, returnable at the next November term, to which time the court stayed the proceedings.

Now, in this case, had the bail, when the circuit arrived, put over the cause on affidavit, to the circuit of the next year, no doubt the supreme court would, on a new application, have stayed proceedings to November term of the next year; so that the time must depend on the circumstances of each case, to be considered by the justice.

(r) 5 John. 357.

CHAPTER XV.

Of Execution.

SECTION I.

OF THE FORM OF AN EXECUTION.

The form of the execution is prescribed by the statute.(a) If issued upon a judgment rendered on a demand arising upon contract express or implied, or on any other judgment founded upon contract, whether issued by a justice or by the county clerk, the clause authorizing an arrest should not be inserted, unless it is proved by the affidavit of the person in whose favor the execution issues, or that of some other person, to the satisfaction of the clerk or justice: 1. That the person against whom the same shall issue, had not resided in this state for the space of thirty days immediately preceding the commencement of the suit, upon which such judgment was rendered, or immediately preceding the rendition of such judgment, if the same was rendered upon confession without process: or, 2. That such judgment was for the recovery of money collected by any public officer: or, 3. For official misconduct or neglect of duty: or, 4. For damages for misconduct or neglect, in any professional employment.(1)

(1) Vid. Sess. Laws of 1831, p. 403, § 30. The act of 1840, vid. Sess. Laws of 1840, p. 120, repeals so much of the act of 1831, as declares that the provisions in the *first section* thereof, shall not extend to any person who shall not have been a resident, &c. The *first section*, referred to in the repealing act, is in these words: "No person shall be arrested or imprisoned on any civil process, issuing out of any court of law, or on any execution issuing out of any court of equity, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree, founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract." The next section contains the clause declaring that the *first section* shall not extend to any person who shall not have been a resident, &c. The section which authorizes

Form of affidavit to obtain an execution authorizing an arrest, under the non-imprisonment act.

JUSTICES' COURT.

James Jackson }
 vs. } RANSOM COOK, Esq. Justice.
 Richard Roe. }

SARATOGA COUNTY, ss: *James Jackson*, plaintiff in the above entitled cause, (or, *John Doe*,) being duly sworn, says, that the judgment in the said cause, was rendered for money collected by the defendant, as a constable of the town of Saratoga Sprtns, in said county: (or, for the official misconduct or neglect of duty, of the said defendant, as a constable, &c:—or, for damages for the misconduct or neglect of the said defendant, as an attorney at law: or, that the said defendant had not resided in this state for the space of thirty days immediately preceding the commencement of this suit; or, immediately preceding the rendition of the judgment in this cause, which judgment was rendered upon confession, without process.)

JAMES JACKSON, or,
 JOHN DOE.

Sworn, this 7th day of December,
 1840, before me,
 RANSOM COOK, *Justice of the Peace*, or
 A. SMITH, *Clerk of Saratoga County*.

FORM OF EXECUTION.

TOWN OF SARATOGA SPRINGS, }
 Saratoga County, } ss.

To any constable within said county, GREETING: Whereas judgment against *Richard Roe*, defendant, for the sum of ten dollars damages, (or, *debt*,) and two dollars and sixteen cents costs, in favor of *James Jackson*, plaintiff, was rendered by and before me, the updernamed jus-

the clause of arrest to be inserted in justices' executions, in cases of non-residence, has no connexion with, or reference to the *first section* of the act; and hence it is fair to presume that the repealing act was merely intended to reach process issued from courts of record, not executions issued by justices of the peace.

It will be seen from the language of the statute cited in the text, that the clause authorizing an arrest, is to be omitted only where the judgment is rendered upon *contract* or *prior judgment*. It is not applicable to other cases, and hence the clause referred to, should be inserted in executions issued upon judgments, in actions of trespass, trover, and all other actions for a *tort* or *wrong*, as well as in actions for a fine or penalty imposed by statute, and in certain cases specially excepted, in the section itself. This clause of arrest, should not be inserted in an execution on a judgment for costs against a plaintiff, where the action was such, that if judgment had been rendered in the plaintiff's favor, he could not have had an execution against the body of the defendant. 9 Wend. 430. 13 id. 68.

tice of the peace of the town aforesaid, on the 5th day of November last, at the town aforesaid : You are therefore commanded, in the name of the people of the State of New-York, to levy the said damages (or, *debt*.) and costs, of the goods and chattels of the said *Richard Roe*, (excepting such goods and chattels as are by law exempted from execution,) and to bring the money in thirty days from the date hereof, before me, at my office, in the said town, to render to the said *James Jackson* : [And if no goods or chattels can be found, or not sufficient to satisfy this execution, you are further commanded to take the body of the said *Richard Roe*, and convey him to the common jail of the said county, there to remain until this execution shall be satisfied and paid.]

Given under my hand at said town, this 7th day of December, 1840.

RANSOM COOK, *Justice*.

Describe the parties according to their character, as directed ante, 456, 457. An execution in favor of the defendant is in the same form, inverting the description of the parties, by substituting the word *defendant* for *plaintiff*, and *plaintiff* for *defendant*. And where the defendant's recovery is for mere costs, and not for any amount of debt or damages, as upon a set-off or otherwise, the execution should run for *costs rendered by and before me*, instead of *damages and costs*, or *debt and costs*, &c. The execution must be dated on the day when it actually issues, and is to be made returnable in *ninety* days from date, where the judgment, exclusive of costs, exceeds *twenty-five* dollars ; in all other cases, it is to be made returnable in *thirty* days from date. 2 R. S. 180, § 141. If these directions of the statute in regard to the time when the execution should be made returnable, are not strictly adhered to, as if, for instance, a 90 day execution should be made returnable in 30 or 60 days, the execution is void. Vid. 9 Wen. 338. 5 id. 276.

It is provided by statute, (b) that on the demand of any person in whose favor a justice shall have rendered a judgment for above twenty five dollars, exclusive of costs, it shall be his duty to give a transcript of such judgment, together with the original bond of security for stay of execution, if there be such bond. (c) It is the duty of the clerk of the county in which the judgment is obtained, to file this transcript and bond, in his office, and to enter and docket the judgment in a book to be by him kept for that purpose, noting therein the time of receiving the same. Such judgment, from and after the time of such entry and docket, becomes a lien on the real estate of

(b) 2 R. S. 177, § 127, 128.

(c) For the form of the transcript, vid. ante, 926, 1025.

the defendant within the county, in the same manner and with the like effect, as if such judgment had been rendered in the court of common pleas; and may in the same manner be discharged and cancelled. The statute further declares,^(d) that whenever a transcript is thus filed and docketed, all executions upon the judgment must be issued by the clerk, under the seal of the court of common pleas; and that the power and authority of the justice, in respect to such judgment, shall cease. No execution can be issued by the clerk upon a judgment thus filed and docketed, until the expiration of ninety days after the time when the judgment was rendered. The form of the execution to be issued by the county clerk is prescribed by the statute,^(e) and may be in the following language:

Form of execution to be issued by county clerk, where a transcript has been filed.

SARATOGA COUNTY, ss: The people of the state of New-York, to the sheriff of the said county, GREETING:

We command you, that, of the goods and chattels of *Richard Roe*, in your county, you cause to be made, fifty dollars and seventy five cents, which *James Jackson*, lately before *Ransom Cook, Esquire*, then a justice of the peace of the said county, recovered against him for his damages (or *debt*) and costs; and if sufficient goods and chattels of the said *Richard Roe* cannot be found in your county, then we command you that you cause the damages (or *debt*) and costs aforesaid to be made of the lands and tenements in your county, whereof the said *Richard Roe* was seized on the 25th day of December, 1840, (*the day of filing the transcript and docketing the judgment with the clerk*.) in whose hands soever the same may be. [And for want of goods or chattels, lands or tenements to satisfy this execution, we command you to take the body of the said *Richard Roe*, and to commit him to the jail of the said county, there to remain until discharged by due course of law;] and do you make return of your proceedings hereon, to the clerk of the said county, within ninety days from the date hereof.

Witness, *Thomas J. Marvin, Esquire*, first judge of the court of common pleas of said county, at the village of Ballston Spa, the second day of January, 1841.

ARCHIBALD SMITH, Clerk.

(d) 2 R. S. 182, § 162, 3.

(e) Id. 183, § 165.

It will be seen that no direction to collect interest upon the judgment is inserted in either of the above forms of execution. This direction need not be contained in the body of the execution, neither is it proper, in all cases, to collect interest upon a judgment in this way. (b) When interest may be properly collected by virtue of the execution, i. e. where the judgment is rendered on *contract* or *prior judgment*, (c) it would be well for the justice or clerk to direct, by way of endorsement upon the execution, that the constable or sheriff collect interest. This endorsement may be in the following form :

Endorsement on execution.

The constable (or sheriff,) will collect, by virtue of the within execution, \$50 damages, and 75 cents costs, with interest from the 1st day of October, 1840.

RANSOM COOK, *Justice*, or,
A. SMITH, *Clerk of Sar. County*.

In addition to the cases in which the clause authorizing an arrest should be omitted in the execution, *vid. ante*, 1034, 5, note (1,) it is provided by statute, that no female shall be arrested or imprisoned upon any execution issued from a justice's court. (d) This provision probably applies to executions issued by the county clerk.

It is provided by statute, that when a judgment is obtained against joint debtors, only part of whom have been served with process, execution may be issued in form against all ; but the justice must endorse on the execution the names of the defendants who did not appear in the suit, as were not served with process of warrant, summons or attachment. This execution cannot be served upon the persons of the defendants whose names are so endorsed ; nor can it be levied on the sole property of any such defendant ; but it may be collected of the personal property of any such defendant, owned by him as a partner of the other defendants appearing or served with process, or with any of them. (e)

Under these provisions of the statute, in a suit against two joint debtors, although process was not served upon one of them, yet if he appear and defend the suit, as he may, it will be the same as if process had been regularly served upon him, and execution may issue against both without the endorsement above required. So, if the process be by summons,

(b) *Vid. ante*, 1001. 2 R. S. 288, § 9.

(c) *Id. Ibid.*

(d) 2 R. S. 182, § 156.

(e) 2 R. S. 179, § 138, 139.

which is served upon one personally, and upon the other by copy, if the latter do not appear, it will be the same as to him, as if it had not been served in any way.(f)

Form of endorsement on execution against joint debtors.

The within named defendant, *John Smith*, was not served with process, and did not appear in the suit.

RANSOM COOK, Justice.

SECTION II.

OF THE RENEWAL OF AN EXECUTION, AND OF ISSUING FURTHER EXECUTIONS.

1. The statute provides,(g) that if any execution be not satisfied, it may, from time to time, be renewed by the justice issuing the same, by an endorsement thereon to that effect, signed by him,(h) and dated when the same shall be made. If any part of such execution has been satisfied, the endorsement of renewal must express the sum due on the execution. Every such endorsement renews the execution in full force, in all respects, for ninety days, if it issued on a judgment for more than twenty-five dollars, exclusive of costs, and for thirty days, in all other cases, and no longer.

The language of the statute, as contained in the above provision, does not, in terms, require that the constable should make a return upon the execution, in order to warrant the justice in renewing it. But the justice ought certainly to be informed whether or not the execution which he is called upon to renew, has or has not been satisfied in whole or in part. In *Wickham v. Miller*,(i) it was held, that a formal written return of the constable, that no goods, &c. could be found, was unnecessary; that verbal information of that fact, given to the justice by the constable, was enough to authorize a renewal. I am not aware that the authority of

(f) Vid. Edw. Treat. 3d ed 128.

(g) 2 R. S. 180, § 142.

(h) Vid. 12 Wen. 145. If the renewal be not signed by the justice, the constable acting under it, and executing the process, is a trespasser; and this though

the renewal be in the handwriting of the justice, and he make an entry of the fact in his docket. Id.

(i) 12 John. 320. Vid. also 1 Wen. 551, S. P.

this case has been questioned. It would be much better, however, and such is the uniform practice, so far as I have been able to learn, for the justice, before renewing the execution, to require the constable to endorse a return thereon, in order that he may know, judicially, whether any thing has or has not been collected upon the execution. Indeed, it is by no means certain, that the justice might not be held responsible, as a trespasser, for renewing an execution which has been satisfied, upon the false information of the constable to the contrary; whereas, if he should exact a written return to that effect, he would always have it in his power to justify the act of renewal, by proper and competent testimony.(j) This renewal may be made after the return day, from time to time, at the option of the plaintiff. 1 Wen. 551.

It is not necessary, in order to satisfy an execution, that money should be received, or goods sold to an amount sufficient to cover the judgment and costs; a simple levy upon sufficient property to pay it, is, in contemplation of law, a satisfaction of the execution.(k) Hence, if it appear by endorsement upon the execution, that a levy has been made, the justice should not renew, unless it further appears by the constable's return, that the property has been sold for an amount below the sum directed to be collected by the execution.(l) Where the execution contains a clause authorizing an arrest, a commitment of the party to jail is deemed a satisfaction; and hence it would be improper that a renewal should be made in such a case.

Form of general renewal of an execution.

The within execution renewed. January 8th, 1841.

JOHN B. GILBERT, Justice.

The same, where a part has been paid or collected.

The within execution renewed for fifteen dollars, with interest from this date. January 8th, 1841.

JOHN B. GILBERT, Justice.

2. Instead of renewing the execution, the justice may, where it is returned unsatisfied in whole or in part, issue a further execution for the amount remaining due.(m) In this case, the language of the statute re-

(j) Vid. 6 Wen. 367. Vid. also 7 Cowen, 310, 314, 315. (l) 7 Cowen, 310, 315.

(k) 12 John. 207. 4 Cowen, 417. 7 id. 18. Id. 310, 315.

(m) 2 R. S. 180, § 144.

quires that there should be a return of the constable ; verbal information, which, as we have seen, is enough to justify a renewal, is insufficient to authorize the issuing of a further execution ;(n) and in one case, where a justice issued a second execution after the first was satisfied, it was held that he was a trespasser, and that it was no excuse for him that the second execution was issued on the false representation of the plaintiff, that the first was lost.(o) He should in no case issue a further execution until the first is duly returned. If the first execution be lost, the party should resort to his action upon the judgment.

The further execution may be, in form, the same as the one first issued, directing the collection of the full amount of the judgment ; and in case any thing was collected upon the prior execution, the justice should, by way of endorsement, state the amount remaining due.

An action on the case lies against a party who wrongfully and wilfully sues out an execution on a judgment which he knows to have been satisfied, whereby the property of the defendant is taken and sold ; and to support the action, it is unnecessary to allege or prove actual malice.(1)

A justice whose term of office has expired, may renew executions issued on judgments rendered by him, at any time within six months after the expiration of his office.(p)

SECTION III.

HOW AN EXECUTION MAY BE SUPERSEDED—WHEN IT MAY ISSUE—AND ON WHAT TERMS IT MAY BE STAYED.

It is a settled principle, that wherever there is, after judgment and before execution, a change of the parties, either plaintiff or defendant, by *marriage, insolvency, or death*, whereby other persons become interested in the execution of the judgment, the execution is superseded, and a new action upon the judgment is necessary, in order to make such new per-

(n) Vid. 8 John. 337. 6 Wen. 367. (1) 7 id. 301.

8 id. 382. 5 Cowen, 417.

(o) 6 Wen. 367.

(p) Vid. 2 R. S. 198, § 253. And vid. post, 1046.

son a party to the judgment: (q) except, indeed, where there are two or more plaintiffs or defendants. In such case, where one or more of either the plaintiffs or defendants survive, execution may be taken out, either by or against such survivor or survivors; but it must be taken out in the joint names of all the plaintiffs or defendants, the same as though they were alive; for otherwise, it will not appear to be warranted by the judgment. (r) In case of death, however, it is settled, that where the execution is tested, i. e. dated, in the plaintiff's or defendant's life time, it may, in all cases, be executed after his death; though it would be otherwise, if tested after his death. (s) In *Asborn v. Moss*, 7 John. 161, it will be perceived by the plea, that a justice's execution was issued and levied in the defendant's life time, and the goods sold after his death; the propriety of this course was not drawn in question, by the counsel in that cause.

It is provided by 2 R. S. 178, § 133, that upon the rendering of a judgment against any person who is not, at the time, a freeholder of the county where the justice resides, nor an inhabitant of such county having a family, execution shall issue immediately; but the justice may require proof from the party demanding such execution, on his own oath, or otherwise, of the fact entitling him thereto, according to this section. (1)

The oath to be administered, in order to obtain an execution under the provisions of this section, may be in the form which we shall presently give, on applications for immediate executions in other cases.

If the judgment be against a person, who is at the time a freeholder of the county, or an inhabitant having a family, execution is not to issue, (except by the written consent of the party against whom the judgment

(1) It is also provided, by statute, that whenever any recovery shall be had before a justice of the peace, for any penalty or forfeiture incurred by violating any provision contained in the ninth title of the twentieth chapter of the first part of the revised statutes, which is entitled, "Of excise, and the regulation of taverns and groceries;" or for any penalty or forfeiture incurred by violating any provision contained in the eleventh title of the same chapter, relating to fisheries, execution shall issue thereon immediately, and the justice shall endorse upon such execution, the cause for which such judgment was rendered; and in case no goods or chattels can be found to satisfy such execution, the constable ~~having~~ the same, shall commit such defendant to the jail of the county, and shall deliver to the keeper thereof a certified copy of such execution and endorsement; by virtue of which, such keeper shall detain such defendant for a period not exceeding sixty days, without allowing him the benefits of the liberties of such jail. 2 R. S. 180, § 140. For the form of this endorsement, *vid. post*.

(q) 17 John. 271. Tidd's Prac. 1021. But *vid.* 2 R. S. 291, § 27, which provides that if a party die after judgment rendered against him, and before execution, no execution shall issue till the expiration of one year after the death of the party against whom the judgment

was rendered. *Vid.* also 9 Wen. 452. But *quere*, as to the application of this statute to proceedings in justices' courts.

(r) Tidd's Prac. 1029. 1 Cowen, 711, 738.

(s) *Vid.* Tidd's Prac. 915, 916. 1 Cowen, 33, 4, note (b)

is obtained, or upon the oath of danger,) till the expiration of thirty days from the rendition and entry of the judgment, where it does not exceed twenty-five dollars exclusive of costs; if the judgment exceed twenty-five dollars exclusive of costs, then execution is not to issue, except as above, till the expiration of ninety days.(t)

The rule in regard to the computation of time in issuing executions, is the same as noticed ante, 262, 3. The thirty or ninety days are to be allowed, exclusive of the day on which the judgment was rendered.

If the party obtaining a judgment shall make it appear, by his own oath, or other competent testimony, to the satisfaction of the justice, that he will be in danger of losing the debt or damages recovered by him, unless execution issue sooner than thirty or ninety days, (according as the judgment is above or below twenty-five dollars, exclusive of costs,) the justice is to issue an execution immediately; unless the same is stayed by the party against whom the judgment was obtained. (The mode of staying execution will be spoken of hereafter.) Application for such immediate execution may be made either before or at the time of rendering the judgment; or, if reasonable notice be given to the adverse party of the intention to apply for such execution, such application may be made at any time after the judgment shall have been rendered.(u)

Application for an immediate execution, if made before, or at the time of rendering judgment, is generally made in the hearing of the opposite party, if present; though this is not necessary; and where an application is made at the close of the trial, it is probably unnecessary to make the oath on the spot, whether the defendant appeared in the suit, or not; for the party applying may be unable to swear to the necessary facts himself, and even if he were able, he should not be compelled to do so. It is enough that the application is made at the proper time—the oath may be administered afterwards, without further notice. The making of the application is enough to apprise the opposite party of the intention to sue out an execution before the time limited by statute; and, if he is desirous of preventing this, he should stay the execution, by giving the requisite security.(v) This application may be made at the time of the rendition of the judgment, in the absence of the opposite party, and *without notice*, even where the judgment is rendered four days after the trial.(w) And a verbal notice, of an intention to apply for immediate execution, made at the close of a trial, in the presence of the counsel for the opposite party, where the justice said he should take four days to make up his

(t) Vid. 2 R. S. 179, 9, § 134.

(u) 2 R. S. 179, § 135.

(v) Vid. 21 Wend. 648, 9.

(w) Id. 84.

judgment, was held sufficient to authorize the issuing of an execution, without further notice, on the oath of danger, made four days after the rendition of the judgment.(x)

If the application for an immediate execution is not made before or at the time of rendering judgment, it may be made at any subsequent time, on reasonable notice given to the adverse party. This notice, should, in strictness, be in writing, and ought to specify the time and place, when and where the application will be made; though the two latter requisites have recently been held unnecessary, and a simple notice in writing of an intention to apply for execution, without stating any *time* or *place*, was held sufficient, where the notice was given *three* days before making the oath and the issuing of the execution.(y)

Form of notice of intention to apply for execution.

JUSTICE'S COURT.

James Jackson	}	To the above named defendant.
v.		
Richard Roe.		

Take notice that I intend to apply to *John B. Gilbert, Esq.*, at his dwelling house in the town of Saratoga Springs, on the 12th day of January instant, at one o'clock, P. M., for an immediate execution on the judgment in this cause. January 8th, 1841.

JAMES JACKSON.

If the judgment is against the plaintiff, and the notice is given by the defendant, the title of the cause should be inverted, as directed ante, 467, note (1), and the notice should be directed to the *plaintiff* instead of the *defendant*. This notice should be served personally upon the party; or, in his absence, it would probably be a good service, to leave it at his dwelling house or place of abode, with his wife or some other proper person. A copy of the notice should be made, and retained, upon which, if necessary, an affidavit of service may be endorsed. If the person against whom the judgment was rendered, should not appear before the justice, at the time and place specified in the notice, the justice should, before hearing the application, require proof, by affidavit, of the due service of the notice. This affidavit should be endorsed upon, or annexed to the notice, and may be in the following form:

(x) 21 Wen. 648.

(y) 21 Wen. 648.

Form of affidavit of service of notice.

JUSTICE'S COURT.

James Jackson }
 v. }
 Richard Roe. }

SARATOGA COUNTY, ss. John Smith, of Saratoga Springs, in said county, being sworn, says, that on the 9th day of January instant, he served upon James Jackson, the above named defendant, a notice of which the within (or, *annexed*,) is a copy, by delivering the same to him personally, (or, *by delivering the same to his wife, at the dwelling house of the said defendant, he being absent therefrom.*)

JOHN SMITH.

Sworn before me, this 12th }
 day of January, 1841. }

JOHN B. GILBERT, *Justice*.

It is the better opinion, that where the judgment is against a person not a freeholder, or inhabitant of the county having a family, the application for an execution should be made at the trial, or when the judgment is rendered, in order that the party may have an opportunity of giving a bond to stay it; but if the application be not then made, notice should be given, as in other cases.(z)

Form of oath to obtain an immediate execution.

You do swear, that you will true answers make to such questions as shall be put to you, touching the necessity of an immediate execution upon the judgment rendered in this cause between James Jackson, plaintiff, and Richard Roe, defendant.

If this oath is administered in a case where an immediate execution is applied for, on the ground that the party against whom the judgment is rendered is not a freeholder, or inhabitant of the county having a family, the party or witness to whom the oath is administered, states that fact; upon the proof of which, execution issues immediately, (unless stayed, by giving security,) without evidence of any additional facts or circumstances. If the application is founded upon proof that the party will be in danger of losing the judgment, if execution is delayed thirty or ninety days, as the case may be, it is not enough for the party or witness to

(z) Vid. Edw. Treat. 3d ed. 128.

swear generally to mere apprehension of danger; he should state facts and circumstances, sufficient to satisfy the justice that he has good grounds for his apprehension; and, it seems, that the adverse party has no right to come in and contest the issuing of an execution, by cross-examining the plaintiff, or any body else who should make the oath of danger. (a) If the justice thinks that a case for an immediate execution is made out, he should issue it forthwith, unless, as above remarked, the party against whom the judgment is rendered, gives the requisite security, of which we shall presently speak.

Executions on judgments rendered by justices of the peace, may be issued at any time within two years from the time of their rendition; (b) but in case the justice's term of office has expired, the time for issuing or renewing executions upon judgments previously rendered, is limited to six months after the expiration of his said office; (c) except he is re-elected and duly qualifies, in which case he may issue executions on judgments rendered by him before the expiration of his former term, at any time within two years from the rendition of the judgments. (d)

It is provided by statute, that the party against whom any judgment shall be recovered, may stay the issuing of execution thereon until the regular time, by giving a bond to the party in whose favor judgment was obtained, in such penalty, and with such security as the justice shall approve, conditioned for the payment of the money recovered, and the costs, with interest, at or before the expiration of ninety days from the time of the rendering such judgment, if such money exceed twenty-five dollars, exclusive of costs; and at the expiration of thirty days from the rendering of judgment, if such money shall not exceed twenty-five dollars, exclusive of costs. If such bond be left with the justice, for the use of the party to whom it was given, at the time of rendering judgment, or before the actual issuing of execution thereon, no execution shall be issued on such judgment until the regular time. (e)

Form of bond to stay execution.

We, *Richard Roe* and *John Styles*, acknowledge ourselves indebted to *James Jackson*, in the sum of — dollars, (*let the penalty be in about twice the amount of the judgment*,) which we bind ourselves jointly and severally to pay. Sealed with our seals, and dated the 8th day of January, 1841.

Whereas, on the 7th day of January instant, a judgment was recovered

(a) Vid. 21 Wen. 649, per Cowen, J.

(b) 2 R. S. 180, § 143.

(c) Id. 198, § 258.

(d) Sess. Laws of 1840. p. 398.

(e) 2 R. S. 179, § 136.

before *John B. Gilbert, Esq.*, one of the justices of the peace of the county of *Saratoga*, by the said *James Jackson*, against the above bounden *Richard Roe*, for — dollars damages, (or, *debt*,) and — dollars and — cents costs: Now, therefore, the condition of this obligation is such, that if the above bounden *Richard Roe*, shall well and truly pay the said damages, (or, *debt*,) and costs, so recovered, with interest, at or before the expiration of ninety (or, *thirty*,) days from the time of the rendition of the said judgment, then this obligation to be void, otherwise of force.

RICHARD ROE, [L. S.]

JOHN STYLES. [L. S.]

Scaled and delivered }
in presence of }

JOHN B. GILBERT.

Form of the justice's approval.

I approve of the penalty and surety of the foregoing, (or, *within*,) bond. Jan. 8th, 1841.

JOHN B. GILBERT, *Justice*.

If the justice issue an execution before it is legally due, he is a wrong-doer, and accountable for the levy or arrest under it, in an action of trover, trespass or false imprisonment. It is an excess of jurisdiction.(f)

SECTION IV.

OF SERVING AND RETURNING THE EXECUTION.

This process is directed to any constable of the county where the justice resides, and is to be executed by him, though the justice may, if he think proper, depute some other suitable person to do this, in the form given ante, 524, 5.

On receiving the execution, it is the duty of the constable to make, within a reasonable time, search for goods and chattels, as directed by it, and in default of finding any, or sufficient to satisfy the demand, to arrest the person against whom the execution is issued, and commit him

(f) Vid. 2 John. Cas. 49. 3 id. 84.

to prison, in cases where the execution contains a clause authorizing an arrest.

It is proper to remark, in this connexion, that although, as we saw ante, 399, 400, a constable would be justified in serving an execution regular upon its face, whether the justice had or had not, in fact, jurisdiction in the particular case, yet he is not bound to do so, where the judgment upon which the execution issues, is void ; and of course, is not, in such case, liable for neglecting to proceed under the execution.(g)

It will be seen, on reference to the form of the execution, given ante, 1035, 6, that the constable is directed to levy the damages, &c. of the "goods and chattels" of the person against whom the execution is issued. By this term, "*goods and chattels*," is meant *personal and moveable* property ; not such chattels as savor of the *realty* and are of a permanent nature. Hence a constable may not levy upon and sell *leasehold property*, or a *term for years*, as it was assumed he might do, in the first edition of this treatise.(h)

By virtue of this precept, the constable has, (subject to the exceptions hereafter mentioned,) a right to seize and sell all *personal chattels* belonging to the one against whom the execution is issued. And in *Hardistey & Barney*, Comb. 356, Holt said, "upon a *feri facias* the sheriff may take any thing but wearing apparel ; nay, if the party hath two gowns, he may take one of them." This exception in favor of *necessary wearing* apparel existed at common law, and still exists, for aught that I have seen to the contrary. It is entirely independent of the statutory provision on the same subject, which applies only to *householders*.(i) and the case in 19 Wen. 475, does not at all affect the common law rule. That case arose under the statute, and was decided without reference to the doctrine of the common law. Vid. 3 Mass. R. 193, 198. The constable may seize upon and sell the tools of a mechanic, and he may make the levy even while the owner is in the act of using them.(j) He may sell every thing which is raised annually by labor and cultivation, as corn growing, which goes to the executor ;(k) and a purchase, under an execution, of corn, or other emblements, growing, carries with it, to the purchaser, the right of ingress, egress and regress, for the purpose of cutting

(g) Vid. 8 Mass. R. 79, 85, 6. 7, and the statute exempting certain property the cases there cited. Vid. also 5 Verm. are cited at large. R. 124.

(h) 19 John. 73.

(j) 1 Yerg. 397.

(k) John. 418. Id. 421 n. 7 Mass. R. 34.

(i) Vid. post, where the provisions of

and carrying away the crop.^(l) A constable may also levy on and sell, such personal chattels as the owner, being a tenant, has a right to remove from the demised premises ; but furnaces, grass growing, fruit not gathered, or other articles which belong to the freehold, and go to the heir, and which include all such things as are growing upon land, but which are not raised annually by labor and manurance, cannot be sold upon this precept.^(m)

One of the principal difficulties, in determining the kind of personal chattels which may be levied upon and sold by the constable, arises upon the question as to what are termed *fixtures*, or *personal chattels annexed to real property*. As between landlord and tenant, we have just seen that such personal property as the latter may remove, may be levied upon by virtue of a justice's execution ; the same may be said of the personal property of a vendor, of real estate, as between him and his vendee ; and so as between heir and executor, &c. Between landlord and tenant, the claim to have articles considered as personal property, is received with the greatest latitude and indulgence. All erections by the latter, for the purposes of trade or manufactures, though fixed to the freehold, are considered as his personal property, and, as such, may be removed by him during his term, or be made available to his creditors, on execution. On his death, they go to his executors or administrators ; yet by a conveyance, they pass to his vendee ; and hence it is, that, as between vendor and vendee, the doctrine of fixtures making a part of the freehold, and passing with it, is more extensively applied than between any others. From these remarks it will be seen, that many articles which would be considered personal chattels, as between landlord and tenant, would be deemed fixtures, as between individuals standing in a different relation to each other. It has been held that a tenant may remove all chimney pieces, and wainscot put up by himself. So, of beds fastened to the ceiling with ropes, or even where they are nailed. So he may remove all such things put up by him, as are necessary for trade, such as brewing utensils, bark-mills, furnaces, coppers, fire-engines, cider-mills, &c. &c., which he has erected, and by which, he not only enjoys the profit of the estate, but carries on a species of trade. There is a stronger tendency to consider fixtures for the purposes of trade, as mere personal property, than in regard to those of an agricultural or domestic character. An attempt to give even a synopsis, of the almost innumerable cases relating to the law of fixtures, would render this head

(l) 9 John. 108.

(m) Vid. Toller's Law of Ex'rs, 114.
2 R. S. 25, § 6.

more voluminous, than is deemed consistent with the design of this treatise. The subject is invested with many difficulties, and intricate questions, each case depending, in most instances, upon its own peculiar circumstances. Indeed, without the advantage of referring to the cases at large, or to the works which treat of this subject exclusively, it is utterly impossible to obtain even a tolerable knowledge of the rules and principles which should be applied, in determining the questions which are constantly arising. We shall therefore drop all further consideration of this head, by referring the reader to Amos & Ferard's Law of Fixtures. Gibbons' do. Vid. also 2 Kent's Com. 3d ed. 341 to 347. 20 Wen. 636 to 657. Walker v. Sherman.

For many purposes *money* is included within the term *goods* and *chattels*, and it is expressly provided by statute, that on executions against the property of a defendant, the officer may levy upon any current gold or silver coin belonging to such defendant, and shall pay and return the same as so much money, without a sale.(n) The officer may also levy upon any bills, or other evidences of debt, issued by any monied corporation, or by the government of the United States, and circulated as money; but these he must sell, and cannot return as so much money.(o) Where a constable was present when money was paid over to another, who delivered it to the constable and requested him to examine and see if it was good, but which, on receiving, he levied on by virtue of an execution which he held against the person to whom the money was paid, this was held regular.(p)

Where goods and chattels are pledged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods, of the person making such pledge, may be sold on execution against him, and the purchaser acquires all the right and interest of the defendant, and is entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.(q) The mortgagor of a chattel, having the right of possession for a definite period, has an interest which may be sold by execution; the purchaser acquires the right of possession and the absolute ownership, subject to the incumbrance.(r) So, personal property, pledged by way of mortgage, may, after forfeiture, be levied upon by virtue of an execution against the *mortgagee*, although it remain in the hands of the mortgagor.(s)

(n) 2 R. S. 290, § 18. Vid. also 12 Wen. 584, 586. 12 John. 220. id. 395.

(o) 2 R. S. 390, § 19.

(p) 12 John. 395.

(q) 2 R. S. 290, § 20.

(r) 8 Wen. 339.

(s) 9 id. 258.

Promissory notes, bills of exchange, bonds, and other *choses in action*, cannot be levied on; (t) nor bank shares, or shares in a public library. (u) Yet some things in the nature of *choses in action* may pass as incidents, and be sold in connexion with the property with which they are connected; thus, it was held that on a levy and sale of the materials in a printing establishment, the subscription list might be included. (v) The constable cannot take goods distrained, or taken and in custody of the sheriff or any other constable upon a former execution or attachment, for these are in the custody of the law; (w) and goods in the custody of the law are not even distrainable for taxes, as being in the possession of the party. (x) Nor can the constable take any thing which cannot be sold, as deeds, writings, &c. (y) And money belonging to the defendant, which the same or another constable has levied, or raised on an execution, in favor of the defendant, against another, cannot be retained or levied on by him. Such money never having been paid over to the defendant, has not become his specific property, and is, for that reason, no more the subject of a levy, than any other debt due to him, or any chose in action. (z)

The goods of two joint tenants, or tenants in common, may be taken for the separate debt of one of them, and sold. All, however, which passes by the sale, is the interest or share of the individual; and the purchaser succeeds to his right, as a tenant in common. (a) If partnership property be seized and sold, for the individual debt of one of the firm, the share of such individual passes, but it is subject to the payment and settlement of the partnership dues; and the remainder only, after discharging these, passes to the purchaser. (b)

It is provided by statute, (c) that the following property, when owned by any person being a householder, shall be exempt from levy and sale, under any execution, and such articles thereof as are moveable, shall continue so exempt, while the family of such person, or any of them, may be removing from one place of residence to another: 1. All spinning wheels, weaving looms and stoves, put up or kept for use by the

(t) 12 John. 220. Id. 395. 1 Cowen, 240. 7 Mass. R. 438. 9 id. 537. 15 id. 534. 12 id. 506.

(u) 9 John. 96.

(v) 2 Watts, 111.

(w) Vid. Show. 173.

(x) 17 John. 128.

(y) Vid. Tidd's Prac. 917, and the cases there cited.

(z) 1 Cranch, 117. Chipman, 66. Vid. 6 Cowen, 494, 497.

(a) 9 John. 108. 16 id. 106. 15 id. 180. 2 Dall. 278. 6 Munf. 113. 2 Doug. 650. 1 Salk. 392.

(b) Id. Ibid. Gow. on Partn. 247. 2 John. 280. 12 Wen. 181. Vid. Grah. Prac. 2d ed. 379, 80.

(c) 2 R. S. 183, § 167.

family ; 2. The family bible, family pictures and school books used by or in the family of such person ; and books, not exceeding in value fifty dollars, which are kept and used as part of the family library : 3. A seat or pew occupied by such person or his family, in any house or place of public worship : 4. All sheep to the number of ten, with their fleeces, and the yarn or cloth manufactured from the same ; one cow, two swine, the necessary food for them ; all necessary pork, beef, fish, flour and vegetables, actually provided for family use, and necessary fuel for the use of the family for sixty days : 5. All necessary wearing apparel, beds, bedsteads and bedding, for such person and his family ; arms and accoutrements, required by law to be kept by such person ; necessary cooking utensils ; one table ; six chairs ; six knives and forks ; six plates ; six tea cups and saucers ; one sugar dish ; one milk-pot ; one tea-pot and six spoons ; one crane and its appendages ; one pair of andirons, and a shovel and tongs : 6. The tools and implements of any mechanic, necessary to the carrying on of his trade ; but the amount thereof shall not exceed twenty-five dollars in value.(d)(1)

These exemptions, are mere personal privileges, of which the owner alone can take advantage.(e) So, undoubtedly, if the owner should turn out his exempt property to the constable to be levied upon, he would not afterwards be permitted to maintain an action for taking it.

With respect to those articles which are exempted on the ground of their being *necessary*, the party claiming the benefit of the exemption must show *affirmatively* and *certainly*, that they were, *in fact, necessary* ; not merely that they might be so.(f)

The above provisions, exempting certain property of a household-er from execution, was intended for the benefit of poor and destitute *families* ; and the father and husband, or head of the family, who has left the state, leaving his wife and children living together, is still, notwithstanding, a *householder*, within the meaning of the act.(2) And a wife has no right to waive the husband's privilege, in his absence, and

(1) Vid. also 3 R. S. 260, for the act passed April 15, 1814 ; by which it is provided, that the following articles, loaned or furnished to indigent widows and females, are exempt from execution, and from being distrained and sold for the payment of rent. viz : looms, spinning wheels, stoves, and their appurtenances ; and wool, worsted, hemp, flax and tow to the quantity of twenty pounds weight ; upon the person taking a receipt therefor, acknowledged in the manner pointed out by the act.

(2) In 6 N. H. R. 263, it was held, that a man's only cow was exempted from

(d) Vid. ante, 434, 5.

(e) 1 Cowen. 114.

(f) 14 John. 434, and vid. 19 Wen. 476, 476, per Bronson, J. Ante, 436.

consent to a sale of his exempt property, even to save other articles which are seized and liable to sale, unless she have some special authority from her husband.(g) In defining the word *householder*, as used in the act of April 18th, 1815, (and the same construction will apply to the present statute,) Judge Platt makes the following remarks :(h) "According to the lexicographers, *household* means, 'a family living together,' and a *householder*, 'a master of a family.' Sacred Scripture, in the same sense, declares, 'he that provideth not for his own household, is worse than an infidel.' I think it clear that the legislature meant to confer this privilege on each of those little primary communities, called *families*. *Murray*, (the plaintiff,) had gone to *Ohio*, leaving his wife and children living together as a *family*. They were his *household*, and he was the *householder*. To say, that a family, while in the act of removal, and on the highway, may be deprived of their bed, and their cow, on execution, because they did not, for the time, inhabit a dwelling-house, would be a perversion of the statute. So long as they remain together, as a *family*, without being broken up, and incorporated into other families, the privilege remains." (3) The word "householder," means the head, master, or person who has the charge of, and provides for, a family, and does not apply to the subordinate members or inmates of the household; and hence it has been recently held, that a person, an adult, residing with his step-mother, and transacting her business, is not a *householder*. And although the exemption of wearing apparel, extends to the debtor and his family, this is only where the property is owned by the householder or head of the family.(i)

The fleeces, or the yarn or cloth manufactured from the fleeces of *ten sheep*, are exempt while in the hands of a householder, whether he be or be not the owner of the sheep.(j)

execution by the laws of that state, although he resided in another state. It does not appear, from the report of the case, whether the debtor had a family residing in New-Hampshire, or whether their statute confines exemptions of property from executions, to householders. Whether it does or not, there can be little doubt that a similar construction would be given to our statute, upon the same state of facts, provided the debtor was a householder, or, in other words, had a family in the state. The case above cited, also decides, that in trespass for taking the debtor's only cow, he is entitled to recover her full value, although the proceeds of her sale have been applied in satisfaction of the execution.

(3) The act under which the question in that case arose, did not, like the statute cited ante, 1051, contain a provision expressly providing that the articles therein mentioned, should continue exempt, while the family of the debtor were in the act of removal.

(g) 18 John. 400.

(i) 19 Wen. 475, 6.

(h) Id. 402, 3. Vid. also 19 Wen.

(j) 11 id. 44. Vid. also 21 id. 68.

475, 6.

The provision of the statute which exempts two swine, extends to the swine after they have been killed for food.(k)

Where the debtor's family consisted of himself and wife, and three young boys, it was held, in Massachusetts, under a statute of that state, which is nearly identical with our own, that but two of the beds were exempt; for one bed might be sufficient for the boys; and in that case, the court seemed inclined to the opinion, that the number of beds should be limited to one for every two persons, in case the sex of the different members of the family rendered the use of the same bed by three of them, inconsistent with the common decencies of life.(l)

Implements of husbandry necessary for tilling land, are not within the exemption in favor of the tools, &c. of any *mechanic*.(m)

It frequently happens, that a debtor, in order to avoid the payment of his debts, disposes of all of his property, except such as is exempted by law, and then sets his creditors at defiance. When this is done, clearly with a fraudulent intent, he is not entitled to the benefits of the statute. So held, in a recent case in the supreme court; which we take the liberty of citing at large, as containing much useful doctrine on this subject. It may be found in 21 Wen. 68, &c.

BRACKETT v. WATKINS.

"Error from the Onondaga common pleas. Brackett sued Watkins in an action of replevin, for taking 30 runs of woollen yarn. The plaintiff proved that he was a *householder*, and that in March, 1837, the yarn was taken from his possession by virtue of an execution in favor of the defendant, and by his direction. In March, 1836, the plaintiff purchased 300 sheep, which he sheared, and sold the whole of the wool except one large fleece of about four pounds. In the summer or autumn of the same year, he sold the sheep he purchased in March. On this evidence, the plaintiff rested. The defendant moved for a nonsuit, on the following grounds: 1. That it was not shown that the yarn in question was made from wool sheared from the plaintiff's own sheep; 2. That there was no evidence that the plaintiff did not own a large flock of sheep through 1836 and 1837; and, 3. That the statute does not apply to a case where a man has a large flock of sheep, and sells all the wool except ten fleeces. The court granted the nonsuit. The plaintiff excepted, and brought error.

(k) Vid. 15 Mass. R. 205.
(l) 15 Mass. R. 170.

(m) 5 id. 313.

By the Court, COWEN, J. The first of the grounds taken by the defendant's counsel in the court below, is now given up as erroneous, on the authority of *Hall v. Penney*, 11 Wen. 44. By this case, the words of the statute were equitably extended beyond their literal import, and made to cover cloth, yarn, &c., whether it comes from the sheep of the owner or not.

Nor can I perceive any force in the other points, when taken in the abstract. It was pretty evident that the plaintiff had reduced himself to the 30 runs, and had no more. Being a householder, the statute conferred upon this the same protection, whether the plaintiff had before owned but 10 or 1000 sheep. I say, in the abstract. Very likely the court below were disgusted with the strong appearance of a fraud upon the statute, by a man disposing of, or covering up all his other property, and turning what was intended as a shield of poverty into an instrument of fraud. It is quite common for dishonest men to do so. But I think the court below have mistaken the remedy. If there be an appearance from circumstances, that the plaintiff has reduced himself to exempt property, in order to defraud his creditors, that question should be submitted to the jury, under proper directions from the court. Their sagacity would be, in general, quite a match for the case. On their being satisfied that the plaintiff had placed himself on his exempt property, in order to defraud his creditors, as in the instance below, by a sale of his sheep and wool, they may clearly place him beyond the reach of the statute, by sustaining the levy. His sales or other arrangements would come within the words of the statute, 13 Elizabeth, being to delay, hinder or defraud creditors; or, if not, they would be void at the common law. The rule, then, is this: *prima facie*, the fleeces, yarn, cloth, and other things limited to a certain amount by the statute, 2 R. S. 290, § 22, are protected. But if the jury believe it was brought down to the compass of exemption, with intent to defraud creditors, they ought to find for the creditor. Most commonly, the other goods being mortgaged or sold, remain still in the debtor's possession, when either they may be seized, or those which are apparently exempt, at the election of the creditor. In general, the mortgaged or sold goods are seized. But the more artful debtor will fix a more secure cover for his property, by changing it into money, or something as little tangible to an execution as may be, when the property claimed as exempt must be resorted to, and the question of fraud litigated upon that. On such obvious fraud as possession after a mortgage or sale, the court may doubtless nonsuit,⁽¹⁾ or direct the jury to find the covin, since the statute has declared the possession to be conclusive evidence,

(1) But *vid. Smith v. Acker*, cited *post*, 1058, et seq.

where it is not satisfactorily explained. Not so of more equivocal instances. On these the question is, in general, for the jury."

It is proper to remark here, that where the defendant in the execution, sues the constable for levying on his property, the constable's authority is sufficiently made out, by producing and proving the execution alone, without the judgment.(n)

It is not necessary, in order to authorize a levy upon property, by the constable, that the ostensible title should be in the defendant; for if he have assigned, sold, or conveyed it away, *not for a valuable consideration*, and *bona fide*, but colorably merely, such sale will be regarded as void, as against an execution creditor.

What shall constitute fraud, in the assignment of personal property, has been much agitated in the English courts, as well as in our own, and a detailed review of the cases on that subject, would be neither profitable nor instructive. They all appear to have settled down in the doctrine, which has been since recognized and declared, *vid.* 8 Wendell, 380, by statutory enactment, 2 R. S. 70, § 5, that every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers.

In the case of *Bissel v. Hopkins*, 3 Cowen, 166, all the cases relative to actual, or constructive frauds upon creditors, by their debtors, are fully reviewed; and the court determine, that in every case, where the question relates to the *bona fides* of the transaction, as to the sale of goods, the retaining possession of them, and the exercising acts of apparent ownership over them, are to be particularly looked to, and that though these appearances are *prima facie* evidence of fraud, yet they may be explained; that it is competent, in the face of all these appearances, to shew that property, which apparently belongs to one, is in fact the property of another, that no deception has been intended or practised,

(n) 12 John. 395.

and that to whom the property in question, in truth belongs, and whether there has been any deception or fraud, or not, are matters of fact for a jury. Where, however, the facts are conceded, the question of fraud is for the court. 7 Cowen, 732. 2 Wendell, 599. Upon the same principle, also, a mortgage of personal property is valid, though the possession of the property remain in the mortgagor, where the transaction is fair; 8 John. 446; 2 Cowen, 246; 3 Cowen, 166; 4 Cowen, 461; 7 Cowen, 290; 8 Wendell, 375; 9 Wendell, 198, 345; 12 Wendell, 297; but in all these cases, the legal test is to be applied, and a judgment creditor, whose execution is levied, will be regarded as on the same footing with a *bona fide* purchaser, and as having the same right to hold the property of his debtor. 2 Wendell, 601. An action, however, by the owner of goods let for an unexpired term, against the officer, for taking them under an execution against the party who hired them, is not maintainable, if it appear that the officer has not sold; and it is, in such case, the duty of the party letting, to give notice to the sheriff, of the limited nature of the hirer's interest. 3 Carr. & Payne, 435; 1 *ibid.* 347. For a full review of all the cases on this subject, the reader is referred to the case of *Bissel v. Hopkins*, 3 Cowen, 166, and the note of the reporter, and to the subsequent cases above cited; and also to the very learned opinion of Savage, Ch. J. in *Hall v. Tuttle*, 8 Wendell, 378, 392.

For the foregoing remarks, *vid. Grah. Prac.* 2d ed. 372, 373. *Vid.* also the recent case of *Doane v. Eddy*, 16 Wen. 523, where it is held, that although a mortgage of personal property is made in good faith and without any intent to defraud, yet if there is not an immediate delivery, followed by an actual and continued change of possession, the mortgage is void as against the creditors of the mortgagor, unless the continued possession in the mortgagor is satisfactorily explained. And, in that case, it was further held, that the fact of the mortgagor being a *travelling or missionary preacher of the gospel*, and that the use of the property mortgaged, (a horse,) was necessary to enable him to pursue his vocation, was not a sufficient explanation of possession in the mortgagor; and that upon such evidence, it was the duty of the court to *nonsuit the plaintiff*, (the mortgagee,) who brought an action of trover for the horse, which had been seized by the defendant by virtue of an attachment against the mortgagor,) and not to submit the question of *fraudulent intent* to the jury. *Vid.* also *Randall v. Cook*, 17 Wen. 53. *Beekman v. Bond*, 19 *id.* 444. But the case of *Smith & Hoe v. Acker*, recently decided by the court for the correction of errors, (not yet reported,) overturns the rules established by the supreme court in the cases last cited from *Wendell's Reports*, so far as regards the power of the court to order a nonsuit, instead of

submitting the question of *fraudulent intent* to the jury. The case was as follows: Smith & Hoe brought an action of *replevin* in the New-York common pleas against Acker, then sheriff of the city and county of New-York, for *taking* an imperial printing press, alleged to be the property of the plaintiffs, from a printing office occupied by Jared W. Bell. The press was taken by a deputy of the defendant on the 20th of January, 1838, by virtue of an execution against Bell. The press in question, together with other presses, printing materials and household furniture, was *mortgaged* by Bell to Smith & Hoe, on the 26th of *March*, 1837, to secure the payment of \$10,000. The mortgage was *filed* in the county clerk's office on the *second day* after the date. The time specified for the payment of the money was the first day of *May*, 1837; and, until default in payment, it was stipulated that Bell should *remain in possession* of the property, and in the full and free enjoyment of it. At the date of the mortgage, Bell was *bona fide* indebted to the plaintiffs in the sum of \$10,000, for presses and printing materials supplied him by the plaintiffs. The property in the printing office was assessed by a third person, and valued at the sum mentioned in the mortgage, and he testified that had it been sold at public auction, under the mortgage, at any time between March, 1837, and January, 1838, *it would not have brought over twenty per cent. of its value*. In the summer and autumn of 1837, Bell was in ill health, and a good part of the time confined to his bed, during which time the plaintiffs assisted him to carry on his business. A book-keeper of the plaintiffs, testified that there was no reduction of the debt owing by Bell to the plaintiffs for the period of a year after the date of the mortgage; that the plaintiffs did not sell out Bell, because they knew that by so doing they would have to sustain a heavy loss, and thought that by sustaining him until the times were better, they would obtain their money, and his other creditors would stand a chance to be paid. The deputy sheriff, at the time of the levy, was told that Bell did not own the property, but that it was mortgaged. The property at the time of the levy was in the possession of *Bell*. The defendant's counsel moved for a nonsuit. The presiding judge decided that the mortgage, being *unaccompanied by possession*, and no reason sufficient in the law being shewn for not taking possession, it was *fraudulent*, and that the plaintiffs were not entitled to recover. The counsel for the plaintiffs insisted that the question of *fraudulent intent* should be submitted as a *question of fact to the jury*; which the judge did not do; but on the contrary, ordered a *nonsuit*, and judgment was accordingly entered, which was subsequently *affirmed* by the supreme court. The plaintiffs thereupon sued out a writ of error removing the record into the court for the correction of errors, where the

judgments of the New-York common pleas and of the supreme court were reversed.

The following opinion was delivered by Mr. Senator HOPKINS, which I extract from the Albany Evening Journal of the 6th of January, 1841. It is valuable, as containing much useful doctrine respecting the various questions which are arising almost daily between creditors and mortgagees of personal property.

"This case presents the important question, arising under the revised statutes, relative to sales and mortgages of personal property, unaccompanied by change of possession, whether evidence of the good faith and intent of the parties shall, on the trial, be submitted to the jury. I perceive no peculiar circumstances or reasons that might not be urged in almost any case, free from fraud, to make this an exception to a general rule on the subject.

"The case also presents the question, whether the filing of a chattel mortgage rebuts the presumption of fraud arising from non-delivery of the property.

"These appear to be the only questions raised or decided in the court below, or presented in the points and arguments submitted in this court. As my vote will directly conflict with the whole course of decisions of the supreme court upon the principal question, I feel it proper to assign my reasons somewhat at length.

"The revised statutes, vol. 2, p. 70, § 5, 2d ed. provide that sales, mortgages and assignments of goods and chattels, 'unless the same be accompanied by immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be *presumed* to be fraudulent and void as against creditors or subsequent purchasers in good faith; and shall be *conclusive* evidence of fraud, *unless it shall be made to appear* on the part of the persons claiming under such sale or assignment, that the same was made in good faith and without any intent to defraud such creditors or purchasers.'

"In the same chapter, p. 72, § 4, it is provided that 'the question of fraudulent intent, in all cases arising under this chapter, shall be deemed a question of fact and not of law.'

"Sec. 9. page 71, provides that a mortgage of goods or chattels, not accompanied by change of possession, shall be *absolutely* void as against creditors and subsequent purchasers, unless the mortgage, or a copy, be filed as mentioned in another section.

"To a mind not embarrassed by the decisions, conflicting opinions and subtleties, with which legal talent has already incumbered our reports, the question would seem a very simple one; to settle which, we hardly need look beyond the very plain letter of the statute upon the subject.

It seems unnecessary to look into the previous state of the law, even to ascertain the mischief for which the statute is intended to furnish a remedy. To my mind it is evident upon the face of the statute itself, that the object was to provide a remedy against actual fraud in transactions, which if conducted in good faith and without any fraudulent intent, are to be upheld as legal; and to facilitate the detection of fraud when it does exist, by throwing the *onus probandi* upon the persons claiming under such sale or mortgage, and requiring them to prove not only that the transaction was in good faith, for good and valuable consideration, but also such circumstances of publicity, reasonableness as to amount, time, value and quantity of property, difficulty or inconvenience of removal, advantages of allowing it to remain, or other circumstances agreeable with ordinary course of business and fair dealing, as shall rebut the presumption of fraud and satisfy the jury that there was not any intent to defraud, hinder or delay creditors.

"The supreme court, however, has taken a widely different view of the question and seem to consider the purpose of the statute to be, not to provide a remedy against actual fraud, by throwing the burden of proof on the party charged with it, but to do away the possibility of fraud, by declaring such transactions absolutely void in all cases where change of possession is practicable, however free from fraud the case may be, or however beneficial it may be to the parties, and even though it might evidently be designed to promote the interests of the creditors generally, by enabling the vendor or mortgagor, by use of the property, to pay his debts.

"In *Beckman v. Bond*, 19 Wen. R. 444, Justice Bronson says, 'The 5th sec. title 2, declares in substance, that as against creditors and purchasers, every sale and conveyance of goods without change of possession, shall be presumed to be fraudulent and void. The question of fact here is about the possession. The provision is *not* that a conveyance made with a *fraudulent intent* shall be void, but that a conveyance of goods without a change of possession *shall be void*.'

"Is the purport of the statute fairly inferred here? Is it not rather perverted, or, at least, the material clause or provision which would make the conveyance only conditionally void, kept out of view or denied? One would suppose that not a word is contained in the statute about fraudulent intent. True, it is added, 'This is the language of the statute, *and except under special circumstances, a jury has nothing to do with the case*.' What then are the special circumstances with which a jury has something to do? The statute says, the good faith and the intent of the parties. The opinions of the supreme court say, only such circumstan-

ces as show that change of possession is impracticable. 'That there must in all cases, where practicable, be a change of possession.' 'The only question of fact is about the possession.' 'The explanation must relate to the possession.' Whereas, the only provision in the statute in relation to possession is, that it being unchanged, fraud 'shall be *presumed*'; making it a matter of *legal presumption*, 'and shall be *conclusive*'; that is, admitting of no explanation, 'unless it shall be made to appear that the same was made in good faith and without any intent to defraud.' Which question of fraudulent intent is, by a subsequent section, expressly made a question of fact and not of law. The use of the term *conclusive*, would seem to preclude any explanation, unless connected with evidence of good faith and intent. By the statute, the possession being unchanged, creates a *presumption* of fraud, which shall be *conclusive*, unless rebutted by evidence of good faith. But the court decides that it is *conclusive*, unless shown to be impracticable, and that evidence of the change of possession being impracticable, is the only evidence of good faith required by the statute. If so, then the statute does not embrace cases of actual fraud; or if it does, the burden of proof of fraud still rests with the creditor, who seeks to avoid the sale or mortgage; and in all cases where the possession cannot be changed, as soon as that fact is shown, the case is taken out of the statute; for instance, in the case of a mortgage of growing crops, which is of common occurrence in the country, the only evidence necessary to sustain the transaction would be to show a mortgage, valid on its face, and that the property could not be moved, and without showing any indebtedness or consideration, for that does not 'relate to possession,' and without in any other way rebutting the presumption of fraud, the party would be entitled to a verdict, unless the creditor should be so fortunate as to be able to prove a negative, as that there was no consideration, or otherwise disclose some fraud in a transaction to which he was a stranger; difficulties from which the legislature no doubt intended to relieve him, in all cases where the possession remains unchanged. Under the construction of the supreme court, the provisions of the statute become inconsistent; and yet from this very fact, the court would seem to draw an inference favorable to that construction. In the case of *Beekman v. Bond*, Justice Bronson remarks: 'To my mind it is quite clear that the legislature did not intend, on one page of the statute book, to declare as matter of law that a particular transaction should be presumed fraudulent, and on the next that the fraud should be a question of fact and not of law.' The error here, as in the other cases, arises from keeping out of view that part of the statute which permits the legal presumption of fraud to be rebutted by evidence of

good faith, presenting a question of *intent*, which the subsequent provision declares shall be a question of fact, and which renders the two provisions perfectly consistent, while under the construction of the supreme court, they cannot in any way be reconciled.

"There seems to be a labored effort to make the provisions of the statute conform to the construction which the court chooses to give it ; and the ground of all the errors of the decisions on this subject would seem to be the desire of the court to establish a code of morals, which shall put it out of the power of persons to commit fraud, rather than to carry out the intention of the legislature to provide means of detecting fraud when committed. In *Randall v. Cook*, 17 Wen. 56, Justice Bronson says: 'The transaction is fraudulent in law ; the sentence is written in the statute book, and neither courts nor juries are at liberty to disobey the mandate. Whatever opinion may be entertained by others, I think this a most *salutary doctrine*. Had it been declared 50 years ago, that if a man conveyed his personal chattels and still kept them himself under any pretence, the transaction should be deemed absolutely fraudulent and void as against creditors and purchasers, it would have saved an incalculable amount of time and money, and would moreover have rendered an important service to the cause of *good morals*.' He continues, 'Although our statute does not go quite so far as the rule I have suggested, it is nevertheless broad enough to admonish,' &c. This last remark of the learned judge appears to me perfectly correct. The statute most certainly does not go so far as the rule suggested ; but at the same time the decision of the court in this very case does extend the statute to precisely such a meaning in all cases where change of possession is practicable ; and in cases where it is impracticable, it of course could not be required.

"Although I respect the motives which dictate the decisions of the supreme court on this question, I can neither agree with the judges in their construction of the law, nor wholly assent to the reasons of policy and morality upon which they ground that construction. The same reasoning would be applicable to almost all the business transactions of life. If every thing capable of being perverted, in the hands of the dishonest, to fraudulent purposes, is to be done away with, the honest portions of the community would have little left of all that they deem most valuable.

"The reasoning, as to general policy, would be equally applicable to all sales upon credit, as also to bailments and trusts. Had all credits been prohibited fifty years ago, it no doubt would, in the language of Justice Bronson, have saved an incalculable amount of time and money. The same objections might be urged against leases or lettings, and even ordi-

nary lendings from neighbor to neighbor. One should not lend his horse to his neighbor even to go for a physician, because it would put it in his power to commit a fraud. Nor should the keeper of a livery stable let a horse for hire, upon the same principle. The merchant must not sell goods to another on credit. One must not sell a yoke of oxen to a farmer to carry on his farm without payment, however honest and deserving he may be, lest somebody else, supposing the farmer to be really worth a pair of oxen, should also trust him for a cow.

"The court seems desirous of establishing a rule that shall do away the possibility of fraud. This is evidently going beyond the object of the statute. Does not the statute provide a reasonable guard against frauds in these transactions, by requiring the party, upon a mere presumption of fraud, to prove himself innocent. To extend the rule beyond that, might be oppressive and deprive many of a privilege they may deem valuable; for if there is no fraud in the transaction, if in case of a sale, the vendor really receives full pay for his property, if the mechanic mortgage his tools for necessities for his family or means to carry on his business, is he any the less able to pay his debts or support his family by being left in possession and use of the property? Is he not in fact better able to do both?

"At all events, it is desirable to establish a more rigid rule: if credits and confidence among our citizens are to be discouraged and done away with, because they sometimes put in the power of the dishonest to commit fraud, it appears to me to be a matter for legislative rather than of judicial correction. But is it certain that a less rigid rule than the supreme court seek to establish, might not rather tend to prevent frauds and undue credits? Would not men look more to their securities? at least, would they not be more inquisitive as to the character of those with whom they deal, and be less likely to trust those who would be unworthy of credit, and consequently withhold from the dishonest the very means of fraud?

"The construction which the supreme court gives to the statute, not unfrequently works injustice. They admit that it sometimes operates not only with inconvenience, but severity and hardship. The honest and confiding citizen may pay out his last dollar in the purchase of a barrel of flour, or any other article of necessity, and if he fails for a single day, under any circumstances, to remove it, and an execution is levied on it, he must be the loser, however consistent with ordinary fair dealing his conduct may have been, or however little able he may be to sustain the loss.

"Nor do I perceive the danger or objections suggested as to leaving

the trial of these questions of fraudulent intent to juries. Can they not be entrusted with that power in these cases, as well as in all other cases of fraud, and in criminal cases even? Indeed, are not juries the proper tribunals to settle the balance of conflicting evidence in such cases? The statute does not take from the court the right to decide upon the competency, admissibility and relevancy of the testimony that may be offered. Proper and pertinent evidence only would be permitted to go to the jury. When the party required to show good faith, offers evidence of his debt or the consideration of sale, the court decide upon the relevancy of the testimony for that purpose. If the creditor offers to prove that the party claiming under the sale or mortgage, knew that the vendor or mortgagor was deeply in debt, and that executions were about to be issued against his property, or that the consideration was not a full one, or that the mortgage covered an unreasonable amount of property, and was calculated to hinder, delay or prevent creditors from redeeming or seeking a remedy against it, the court would decide upon the relevancy of the evidence; but when proper and pertinent evidence to show the intent of the parties, has been submitted to the jury, they decide according to its convictions upon their minds. I see no danger or difficulty, therefore, in submitting the question of intent in these cases to a jury.

"As to the question arising under the ninth section of the statute, requiring chattel mortgages, when the possession is unchanged, to be filed, I think that such filing does not of itself rebut the presumption of fraud arising from non-delivery of the property, but still leaves the burden of proof of the *bona fides* of the transaction, with the party claiming under the mortgage; and in addition to such proof, he is required to show that the mortgage, or a copy, has been filed. This provision relative to filing, passed subsequently, does not repeal the former provision changing the *onus probandi*, but creates an additional safeguard; and, I think, affords further evidence that the legislature did not intend wholly to do away with such mortgages, when made in good faith, but to provide all reasonable protection against frauds undertaken to be covered by them. In this view, the two provisions are perfectly consistent with each other.

"In this case, the plaintiffs, in an action of *replevin* to recover a printing press and other property levied on under an execution by the sheriff of New-York, proved their mortgage, (admitted to be regularly filed,) also their debt contracted for part of the property mortgaged; the value of the property; that it could not at the time be sold but at a sacrifice; that the mortgagor was a printer, and required the use of the press in

his business ; and that its removal would lessen his ability to pay his debts.

" I think the judge erred in refusing to submit the testimony to the jury ; and that the judgment of the supreme court, affirming the decision of the court below, should be reversed."

The question of fraud, resulting from possession by the debtor, may arise in various other ways than between mortgagees and creditors. Thus, where a plaintiff buys property sold under his execution, and leaves it in the possession of the defendant, without any good excuse shown, the sale is *void* as against other creditors of the defendant, notwithstanding the plaintiff subsequently, and before levy under other executions, reduces the property to his actual possession.^(o) A sale void, as to creditors, is good against the party, his executors and administrators.^(p)

Your being in possession of my goods, does not expose them to execution against you, though you may be the reputed owner, unless there be some fraudulent or deceptive purpose shown, or implied from the circumstances of the case ;^(q) nor does my knowing of a judgment against the vendor, render my purchase of him void, unless I act fraudulently ;^(r) though it is void, if I purchase with a view to defeat the judgment.^(s) And where the purchaser, under an execution, is not the creditor, but some third person, purchasing *bona fide*, his leaving the goods in the debtor's hands, is not fraudulent.^(t) So, if the property be ponderous, or fixed to the freehold, and possession be taken from the debtor within a reasonable or convenient time, its remaining in the debtor's hands is not, under these circumstances, evidence of fraud.^(u)

A very usual impediment in the way of executions, is that which is created by assignment of the debtor's property, in trust for the benefit of creditors, before the levy of the execution. This results from the principle, which is well settled, that a debtor in failing circumstances, may prefer one creditor or class of creditors over another, 7 Cowen, 735 ; 2 John. Ch. R. 307 ; 4 id. 682 ; 1 Binn. 502 ; and that such preference will protect his property from being levied on, at the suit of a judgment creditor, whose execution is issued subsequently to the assignment. The validity of such an assignment is only recog-

(o) 21 Wen. 169. Vid. 15 John. 430,
and note.

(p) 9 John. 337.

(q) Id. 197.

(r) 8 id. 446.

(s) 12 id. 320.

(t) 9 id. 135.

(u) 2 id. 418.

nized, however, where it is fair and without fraud. If it be of the latter character, it is void, both at law and in equity; and the plaintiff in the execution may either treat it as such, and levy, notwithstanding the assignment, or, as is more usual, may file a bill in equity to remove the fraudulent obstruction. The plan of this work will not permit even an allusion to the many distinctions, which have grown out of the application of this rule, and with which the reports, chiefly in equity, of our own state, and those of our sister states abound. The reader will find them fully discussed by Chancellor Kent, in his commentaries, vol. 2, p. 530—532; and by Mr. Angell, in his recent work *on the law of assignments, in trust for the benefit of creditors*, where the law on the subject is examined with great clearness and ability. Vid. also the Indexes to the Chancery Reports of this state, tit. *Debtor and Creditor*, and *Fraud*.(1)

For the same reason, also, which protects the judgment creditor from the fraud of his debtor, the former will not be allowed to avail himself of the fraud of the latter to satisfy his execution. Thus, where a debtor confesses a judgment, and afterwards fraudulently purchases, and procures to be delivered, goods, without paying for them, with intent to subject them to the execution of the judgment creditor, the title of the goods does not become vested in the purchaser, and they therefore cannot be taken on an execution against him, 15 John. 147; and in such a case, the court of chancery will direct the goods to be restored to the seller. 1 Paige, 492. 2 id. 172; and vid. 10 Moore, 53.

For the foregoing remarks in relation to voluntary assignments, vid. Grah. Prac. 2d ed. 373, 4.

If the goods seized by a constable on execution, are claimed as belonging to some one, other than the debtor, or if he have reasonable ground of doubt as to the ownership of the property, he is bound, if no indemnity be tendered by the creditor, to call a jury and try the title.(v) If they find the goods are not the debtor's, the execution may be returned *no goods found*, and the constable is justified in making that return, unless an indemnity be tendered. If it be, he is bound to proceed, notwithstanding the finding of the jury. But the creditor is not bound to tender a bond of indemnity, until after the jury have passed upon the question of property; and an officer acts at his peril, in making a return of *no goods found*, under any other circumstances; and even the declaration of the creditor or his attorney, that he would sell, let the jury find as they would, does not dispense with the necessity of calling a jury.(w)

(1) Vid. also 18 Wen. 353.

(w) 8 Cowen, 65. Vid. 7 Wen. 233,

(v) Vid. 7 Wen. 236, 238, per Nelson, 230.
J. Vid. also 10 John. 98.

If the finding of the jury be, that the goods are the debtor's, this will not protect the constable from an action of trespass for the goods, at the suit of the claimant, though it may be given in evidence to mitigate damages, or for the purpose of showing that he has not acted maliciously.(x)

The constable may avoid the necessity of calling a jury, by taking from the party a bond of indemnity in the first instance, if he is willing to give it; if not, the constable should proceed to try the title in the manner above mentioned. Where there is any doubt, the constable, for his own safety, should not sell the property without first obtaining an indemnity; and this, more especially, because the law will not imply any promise of indemnity from the creditor;(y) and the constable would, otherwise, be without any remedy, except the mere recovery back of the money which he pays over to the creditor, upon a sale of the wrong goods, where their value is recovered by the owner against him.(z)

Form of bond to indemnify constable in selling goods on execution.

Know all men by these presents, that we, *James Jackson* and *John Doe*, are held and firmly bound unto *Thomas Noakes*, a constable of the county of *Saratoga*, in the penal sum of 200 dollars, (*double the value of the goods*) to be paid to the said *Thomas Noakes*, or to his certain attorney, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 1st day of October, A. D. 1840.

Whereas the said *Thomas Noakes*, as constable as aforesaid, by virtue of a certain execution, issued by *Ransom Cook*, Esq. one of the justices of the peace of the said county, against *Richard Roe*, in favor of the said *James Jackson*, for fifty dollars damages and three dollars costs, hath seized, or is about to levy the same execution, upon one certain bay horse, with a wagon and harness, now, or lately in possession of the said *Richard Roe*, with intent to sell the same, in order to satisfy the said execution; now, therefore, the condition of this obligation is such, that if the said *James Jackson* shall, at all times, and forever hereafter, keep the said *Thomas Noakes* harmless and indemnified of, from and against all damages, costs, charges, trouble and expense, of what nature soever,

(x) 10 John. 98. 15 id. 147. 8 id. (y) 1 Campb. 343. 2 id. 452.
185. Vid. 3 Maule & Selw. 175. (z) 2 Campb. 452.

which he may be put to, sustain or suffer, by reason of such levy and sale, or either, then this obligation to be void, or otherwise of force.

Sealed and delivered, in }	JAMES JACKSON, [L. S.]
presence of <i>John Smith.</i> }	JOHN DOR, [L. S.]

This bond, or other contract of indemnity, will be valid and binding, wherever there is the least possible doubt as to the title to the goods; but where there is no pretence to seize them, but all parties, including the constable, must know that they are wrongdoers, no indemnity can bind: for an engagement to indemnify a man for what he must of necessity know to be a trespass, is upon an illegal consideration, and, therefore, void.(a)

If, after diligent inquiry, no goods can be found, the constable is blameless, even though there be, in fact, goods and chattels sufficient. Accordingly, in an action against him for the neglect, he may show in his defence, an enquiry of the neighbors, or other proper persons, with their answers, touching the goods, as well as other acts of his, in searching for property, for this goes to negative the charge of negligence.(b)

If the goods levied upon, either by a sheriff or constable, lie without sale an unreasonable time, in the defendant's possession, with the consent of the plaintiff, the levy is void, and the goods subjected to a junior execution;(c) as where the sheriff levied upon goods, and, with the plaintiff's assent, suffered them thus to lie for one whole year.(d) And the mere act of leaving goods levied on, in the possession of the defendant, is, when unexplained, *prima facie*, evidence of fraud.(e) But if all the possession is taken, of which the thing is capable, or conveniently susceptible, this is enough; as of standing corn, which may be left in the field, or ponderous articles which may remain with the defendant, till a sale.(f) And though goods levied upon, are left with the defendant, and suffered to lie an unreasonable time before sale, yet if they are in fact sold to a *bona fide* purchaser, a junior execution cannot then take them.(g)

In these cases of conflicting executions, if the constable who made the first levy, sue the constable who made the second levy, under the junior execution, the latter may, in his defence, show fraud in the first judgment

(a) 17 John. 142.
 (b) 1 Conn. R. 387.
 (c) 11 John. 110.
 (d) Id.

(e) 15 id. 430.
 (f) Vi.l., 2 id. 418. 15 id. 423.
 (g) 14 id. 222.

and execution, equally, as if the creditor upon the first execution had himself been plaintiff.^(h)

The rule is, that wherever the senior execution, or the levy thereupon, is fraudulent, a junior execution may take the goods levied upon, and the first execution utterly loses its priority, and is considered as void and of no effect, from whatever court it issued. We have already noticed some of the cases decided upon this principle. Fraud being, in general, not susceptible of positive proof, its very nature presupposing concealment, the law seizes on certain *indicia*, which usually accompany an intention to deceive, and considers them, unless very fully explained, as equivalent to proof of actual fraud. Besides, it is unreasonable that one creditor, who has levied upon goods, should use his priority to the delay or injury of others seeking the same remedy. He ought, therefore, to conclude the concern by a sale in a reasonable time, or lose his priority. Pursuant to these principles, in addition to the cases already mentioned, it has been decided that an execution loses its priority in the following cases: Where the plaintiff instructs the sheriff to delay the execution after seizure, or agrees to let the execution sleep in the sheriff's hands. 8 John. 20. Where the creditor consents to leave the goods in the possession of the defendant, without a receiptor, who goes on and uses them as before. 11 John. 110. Or where he leaves them in the defendant's possession, without a receiptor, whether the defendant use them or not. *Id.* Where the creditor gets the sheriff to levy, but will not suffer him to proceed further, leaving the defendant in possession. 7 Mod. 37. Where the owner, after levy, is to keep possession on certain terms. *Prec. in Ch.* 286. Where the plaintiff's attorney tells the sheriff to use the defendant kindly, and not take any of his household goods, for another will shortly pay the debt; and the sheriff levies, leaving the goods with the defendant. 1 Wils. 44. Where the party tells the sheriff, on delivering the execution, "you may let it lie, it requires no haste." 5 Mod. 376. Where the creditor gives the debtor permission to use part of the property levied on; 15 John. 428; or permits provisions levied on, to remain with the debtor, and be consumed by his family. *Id.* 429. Where the plaintiff gives his execution to the sheriff, telling him to make a levy, but do nothing till ordered, unless crowded by younger executions, but by no means to let his execution lose its preference, and the sheriff pursues such instructions. 17 John. 274.

Where there has been no delay, we have seen ante, 409 to 415, that the first levy binds. *Vid.* also 19 Wen. 495. And we noticed ante,

(h) 15 John. 428.

page 412, that though such senior execution takes preference, yet if the sheriff, having both executions, sell on the junior one, the sale is valid, and the plaintiff in the senior execution, must look to the sheriff. This last rule is also recognized in 18 John. 311. It is also settled, by the case at the page last quoted, that after a *fi. fa.* delivered to a sheriff, though before it is actually levied, the act of the defendant in removing the goods into another county, where they are sold under another execution, is a violation of the rights of the sheriff, who received the first execution, for which he might maintain an action against the defendant; and further, that such act of the defendant, in removing the goods, will not deprive the plaintiff in the first execution of his remedy; but the sheriff will be ordered to pay him the money levied by the second execution. How far a delivery of a *fi. fa.* to the sheriff, binds personal property, and renders a sale thereof by the debtor void, *vid. ante*, 410, 411, 414. 18 John. 303.

The constable cannot justify breaking open the outer door of the dwelling house of the defendant, in search either of his goods, or the goods of any of his family, who are defendants; and this includes his servants and lodgers, where the execution is against any of them. The house is a protection for them all.(i) But my dwelling house will not protect the goods of a stranger, i. e. one not of my family. And after demand and refusal, it may be broken to seize them.(j) Accordingly, where the constable finds the outer door of the defendant's dwelling house shut, he should not open it; but if that be open, he may, if necessary, break open an inner door, even without first demanding admittance.(k) Goods may be taken through the windows of a dwelling house, if open, though the outer door be shut. And an officer, having legal process against the goods of one, may enter the store of another where the goods are, for the purpose of executing the process, and may even break open the door if refused admittance, on request, and may remain there long enough to seize, secure and inventory such goods; but he cannot take exclusive possession of the store, or eject the owner therefrom, with a view to the security or custody of the goods. Though if the owner of the store resist or oppose him, he may use what force is necessary to enable him to perform his duty.(l)

But this question of local privilege was so fully considered *ante*, 513 and 514, that I shall content myself with referring to those pages, with

(i) 13 Mass. R. 520.
(j) *Id.* 5 Co. 93, a.

(k) Cowp. 1. 5 John. 352. 4 Taunt. 618.
(l) 2 Aik. R. 415.

the remark, that the privilege of *goods*, from the circumstance of their being in a *dwelling house*, stands, in all respects, on the same footing with that of the *person*.

What shall constitute a levy is not defined with precision. The constable's taking the property into his custody and removing it, is one of the strongest acts by which a levy can be made. This, however, is not necessary; but still, to constitute a levy, the property should be taken into his actual or constructive possession.^(m)

A seizure of part of the goods in a dwelling house, in the name of the whole, is a good seizure of all. The execution must be levied before the return-day, and the constable ought to make an inventory of the goods, in order to complete the levy. This, however, is not strictly necessary; but he should, at any rate, have the goods within his view, and under his power, before they can be said to be levied on; for merely seizing a few goods outside of a store, or warehouse, and proclaiming a levy on all the goods locked up in the place, but not within view, will not constitute a levy upon them, but the constable should open the store, and take an inventory.⁽ⁿ⁾

In *Beekman v. Lansing*, 3 Wen. 446, 450, Marcy, J. in delivering the opinion of the court, says: "What shall constitute a levy is not very distinctly defined in the reports of cases in this court. In *England*, the officer enters upon the premises in which the defendant's goods are, and leaves one of his assistants in possession of them, or he causes an inventory to be taken, and removes them. 1 Arch. Prac. 293. 1 Maule & Selw. 711. 5 Taunt. 198. We are not disposed to go this length, but are of opinion that the officer should enter upon the premises where the goods of the defendant are, and take actual possession of them, if they are such of which possession can be taken. The goods should be brought within his view, and subjected to his control, *Haggerty v. Wilder*, 16 John. 288; and it is proper also, if not necessary, that an inventory should be taken of them; the officer should assert his title to the goods by virtue of the execution; and we are inclined to think that his acts, as to the asserting of his rights and the divesting of the possession of the defendant, should be of such a character as would subject him to an action as a trespasser, but for the protection of the execution; they should be public, open and unequivocal, and nothing should be done by him to cast concealment over the transaction. But it is not necessary that an assistant of the officer should be left in possession of the goods;

^(m) Vid Edw. Treat. 3d ed. 132. 2 ⁽ⁿ⁾ Vid. 16 John. 287.
R. S. 180, § 145.

or that the goods should be removed ; they may be left in the custody of the defendant, at the risk of the plaintiff, or of the sheriff, or on obtaining, as is customary, a receiptor for their delivery, on demand." Vid. also 10 Wen. 349. 11 id. 548. 14 id. 124, 5.

The constable cannot pay the plaintiff with his own money, and levy, or retain the levy under the execution, even though the defendant agree with him, that this may be done for the constable's security, where the money is raised on their joint credit.(o)

If goods are levied upon by one execution, upon a subsequent one being given to the same constable, the goods levied upon by the first are bound by it, without any actual levy under the second execution.(1)

Upon seizing the goods, the constable should, as we have just seen, either take them into his actual custody, or deliver them to some responsible receiptor. He is under no obligation to do the latter, though this is generally done where a proper person offers to receive them. Upon thus parting with the possession, he should be careful to take the proper written acknowledgment, with a promise to re-deliver them.

Form of a receipt of goods levied upon by an execution.

JUSTICE'S COURT.

James Jackson }
v.
Richard Roe. }

Execution issued by Ransom Cook, Esq., one of the justices of the peace of the county of Saratoga, for	-	-	-	-	-	\$25,00
Constable's fees for collecting,	-	-	-	-	-	2,00

\$27,00

Under the execution above described, *George C. Loomis*, one of the constables of the said county, has levied upon the following goods and chattels, the property of the said *Roe*, viz.

19 Windsor chairs, worth \$1 each,	-	-	-	-	-	\$19,00
2 Looking glasses, worth \$10 each,	-	-	-	-	-	20,00
1 Dining table,	-	-	-	-	-	10,00

\$49,00

October 2d, 1840. Received of the said *George C. Loomis*, the goods and chattels above mentioned, which I promise to deliver to him, at any

(o) 16 John. 443.

(1) 7 Taunt. 56.

time when he shall demand the same, at the dwelling house of the above named *Richard Roe*, in the town of *Saratoga Springs*, in the said county, or in default thereof, I do hereby agree with the said *George C. Loomis*, to pay him the amount of the above mentioned judgment, as the same is above specified, together with the above mentioned fees for the collection thereof.

JOHN DOE.

If the constable prefer it, he can specify, in this receipt, the precise time, as well as place of delivery, or he may omit both as suits him, for if he parts with the possession, he is to be accommodated as to terms.

Having once levied on sufficient to satisfy the execution, the constable cannot make a second levy ; for the judgment is considered discharged by the first.(p) But this rule will not apply, if it should turn out, that the property did not belong to the debtor, in consequence of which, it was given up. So, if the property should be sold, and the execution returned satisfied, and a third person should afterwards recover the value of it from the officer or party, on the ground that it was his property, the judgment would not be discharged, and in the supreme court, leave would be given to strike out the endorsement on the execution, and to issue a new one.(q) As such leave could not be obtained in a justice's court, an action might be sustained on the judgment.

Although a levy under an execution, on property sufficient to satisfy it, is, ordinarily, a satisfaction of the judgment, yet it is not so when the property is fraudulently withdrawn by the debtor from the possession of the officer.(1)

The constable should be sure to levy and sell within the life of the execution ; for it is provided by statute,(r) that a constable shall not levy upon, or sell any property, or imprison a defendant, upon any execution, after the time limited therein for its return, unless such execution shall have been renewed. Nor shall any constable do any act under a renewed execution, after the expiration of the time or times, for which the same may have been renewed. If, therefore, the constable allow the execution to sleep, and pays the money to the plaintiff himself, without making any demand upon the defendant, he cannot even maintain a suit against the defendant, for the money so paid.(s) And whether such demand, and payment afterwards, *without* the defendant's request, will sustain an action against him, is very questionable.(t) On this subject,

(p) 7 Cowen, 18. 4 id. 417. 12 John. 207.

(q) 5 Cowen, 280.

(1) 11 Wen. 125. Vid. 6 id. 562.

(r) 2 R. S. 182, § 159.

(s) 8 John. 474. 8 id. 436.

(t) 10 id. 361. Id. 404. Ante, 148.

vide ante, 148. An actual levy must be made, in order to vest a property in, and enable the constable to maintain an action for the goods ;(u) and he cannot maintain this action after the execution has run out, for it is then no longer a lien upon property levied on.(v) The priority of the execution depends on its actual levy, and not on the time when it came to the constable's hands.(w) That this is the case with all executions and other proceedings in the nature of an execution, we inferred at large, ante, 409 to 415.

The constable, after taking goods and chattels into his custody, by virtue of the execution, must endorse thereon the time of levying the same, and immediately give public notice, by advertisement signed by himself and put up at three public places in the city or town, where the goods and chattels are taken, of the time and place, within such city or town, when and where they will be exposed for sale. Such notice shall describe the goods and chattels taken, and shall be put up at least five days before the time appointed for the sale.(x) It is enough to save the lien of the execution, which does not attach until actually levied,(y) provided the advertisement be in sufficient season to sell at any time before the return day.(z) But no sale can take place afterwards, as we have just seen, unless the execution be renewed,(a) which would of course discharge the lien of the first. Indeed, a renewal would be improper, where sufficient goods were found on the first execution.(b)

If the goods are receipted, to be delivered on demand, they must be demanded within the life of the execution, or the receiptor is discharged, he being considered by the law a mere naked bailee ;(c) and there being in this case, no precedent debt or duty, a demand is essential to create it.(d) And even the alternative of paying the debt, in default of delivering the goods on demand, could not, of course, be enforced, without a demand in due season. If the goods turn out to be the property of a third person, the receiptor is discharged wholly of his obligation, for there is then no consideration for his promise ; the constable is also discharged of course ; and so if the title fail as to part of the goods, he is discharged as to them.(e)

The constable should not omit to endorse his levy upon the execution, which endorsement should contain, not only the *time* when the levy was

(u) 12 John. 403.

(v) 7 Cowen, 310.

(w) 13 John. 249.

(x) 2 R. S. 180, § 145.

(y) 13 John. 249.

(z) Id. 251, per Yates, J.

(a) 2 R. S. 182, § 159.

(b) Id. 180, § 142. Vid. 12 John. 322, per Yates, J.

(c) 9 John. 361.

(d) Id. Vid. ante. 807, 808.

(e) 12 Mass. R. 163. 13 id. 224. 4 id. 498.

made, as is specially required by the statute, but should set out the articles levied upon. If they are numerous, and cannot all be written on the back of the execution, he should, notwithstanding, make the endorsement, referring therein to an inventory of the property attached, which should be drawn out with as much particularity as may be, and attached by means of a wafer, wax or pin, to the execution. This endorsement will be *prima facie* evidence, for the constable, of the facts contained in it. (f)

Form of endorsement by constable of a levy.

Jan. 20th, 1841. The within execution levied on one bay mare, the property of the defendant.

Geo. C. Loomis, Const.

Same, where an inventory is attached.

Jan. 20th, 1841. The within execution levied on the goods and chattels of the defendant, (1) mentioned in the annexed inventory.

Geo. C. Loomis, Const.

Form of an inventory, to be attached.

An inventory of goods and chattels this day levied upon and taken into my custody, in virtue of the annexed execution.

One mahogany bureau,	Six Windsor chairs,
One cherry dining table,	Two maple bedsteads,
Two mattresses,	One wash stand.

Geo. C. Loomis, Const.

The notices of sale should be immediately given, and must be posted up in three public places in the city or town where the property is taken. The sale must also be in the same town. The notice should describe the goods and chattels, with the *time* and *place* of sale; and should also contain the name of the person whose property is to be sold. The notice must, moreover, be signed by the constable, and be posted up five days before the time appointed for the sale. According to the rules laid down ante, 262, 3, the five days are to be computed exclusive of the day of affixing the notice; and a notice of sale on Monday, must run, at least, till the next Friday.

(1) It was held in 20 Wen. 145, that where a constable returned to an attachment, that he had levied on *certain property*, that the return would be intended to mean, that he had levied on the *property of the defendant*. Vide ante, 522, 3.

(f) 7 Cowen, 310.

Form of the constable's advertisement of sale.

By virtue of an execution, (or, of *sundry executions*,) I have seized and taken one mahogany bureau, &c., (*name the articles particularly*,) the goods and chattels of *Richard Roe*, which I shall expose to sale at public vendue, to the highest bidder, on the 25th day of January instant, at 10 o'clock A. M. at the Columbian Hotel, in the village of Saratoga Springs. Dated January 20, 1841.

GEO. C. LOOMIS, Const.

At the time and place appointed for the sale, if the goods and chattels be present, and pointed out to the inspection and examination of the bidder, the constable is to expose them to sale at vendue, to the highest bidder. (b) If not so present, &c. no property in them will pass to the purchaser. (c) The constable's authority over the property ceases, on the execution being returned satisfied, so that he cannot, then, remedy any defect in the first sale, by re-selling, assigning, or deeding the property over again. (d) A general sale of *all the personal property* of the defendant, or the *residue* of his personal property, is a nullity, and will not carry the title of the goods; for the property, in order to pass it, must be pointed out specifically, and sold in separate parcels. (e) Yet if part of the property be present and proclaimed, though property which is absent be set up for sale in the same parcel, that which is present will pass, while the title to the absent property remains unchanged. (f) A sale upon an execution, will pass no greater title to the purchaser, than the defendant in the execution has to the same property. (g) But where the constable seizes and sells your property on an execution against me, the law adjudges it legally and peaceably in the hands of a mere purchaser, who had no hand in the original seizure; and in such a case, before an action of trover will lie for the property, you must demand it of the purchaser. (h)

The proper course for the constable, is, to sell so much property only as will satisfy the execution, and which can conveniently and reasonably be sold separately. (i)

If a constable having several executions against the same property, sell the whole on a junior execution, yet the sale is valid, and passes a

(b) 2 R. S. 180, § 146.

(c) 1 John. Cas. 284. 14 John. 222.
17 id. 116.

(d) 1 John. Cas. 284.

(e) 14 John. 352. 1 John. Ch. R. 502.

(f) 14 John. 222.

(g) 8 id. 333.

(h) 6 id. 44.

(i) 8 id. 333.

good title to the purchaser, and the only remedy for the plaintiff in the senior execution, is by suit against the constable for the mal-feasance.(j)

The constable should levy and sell in due season. If no bidders attend, he should postpone the sale, and give notice to the one in whose favor the execution is issued, who should attend and bid himself; and if he do not, the constable will be excused in returning that the property remains on hand for want of buyers. So he would be excused in making such a return, if he could not sell the property but at a great sacrifice. Yet after he has made such a return, he must proceed and sell the first opportunity. The same rules of law which govern sheriffs in the execution of process from the higher courts, govern constables in the execution of a justice's process, except when some statute intervenes.(k)

A constable's sale may be adjourned to a different time and place, even after it has commenced.(l) But by statute,(m) a constable is deemed guilty of misdemeanor, and on conviction, subject to fine or imprisonment, or both, in the discretion of the court, and forfeiture of his office, if he ask or receive any money or valuable thing from a defendant, or any other person, as a consideration, reward or inducement for omitting to arrest any defendant, or to carry him before any justice; or for delaying to take any party to prison; or for *postponing the sale of any property under any execution*; or for omitting or delaying the execution of any duty pertaining to his office.

If a constable's term of office expires before the expiration of the time for the collection or return of the execution, he may proceed in the same manner as though his term of office had not expired; and the liability of his bail continues.(n)

On a sale at auction, the bargain is not struck, till the article is knocked down, until which, the bid, being a mere proposition, may be withdrawn. But when the article is knocked down, if the bidder do not receive it, and pay the money, the article may be sold again, and the bidder is liable to pay the constable the loss upon the second sale, or the constable may prosecute an action against the purchaser, for goods bargained and sold.(o)

Where, on a sale of the goods, a single bid amounts to fifty dollars or more, (which is very seldom the case,) it is perhaps necessary that the requisitions of the statute of frauds should be complied with, by a note or memorandum in writing, earnest, or part delivery, as we mentioned ante, 50, 51, 52. Indeed, there is great propriety in the constable's

(j) 12 id. 162. 18 id. 311, S. P. Ante, 412.

(k) 2 Cowen, 421.

(l) 5 John. 345.

(m) 2 R. S. 194, § 234, 236.

(n) Id. 201, § 285, 6. 7 Wen. 220.

(o) Ante, 101. 1 H. Bl. 81.

executing and delivering to the purchaser a memorandum of sale, whatever the amount of his bid may be.

Form of a memorandum of sale of personal chattels.

JUSTICE'S COURT.

James Jackson }
v. } Before John B. Gilbert, Esq. Justice.
Richard Roe. }

January 25th, 1841. James Denn, bought of George C. Loomis, constable, at auction, on an execution issued in this cause,

1 Mahogany bureau,	-	-	-	-	\$50 00
1 Cherry dining table,	-	-	-	-	10 00
					<hr/> \$60 00

GEO. C. LOOMIS.

JAMES DENN.

There is another class of cases, in addition to those which have already been mentioned, where, although the property levied upon by virtue of an execution, may belong to the debtor, the rights of third parties are protected; I allude to the landlord's claim for rent. The law on this subject, is contained in the following statutory provisions. "If an execution be levied upon any goods or chattels, in, or upon any demised premises liable to distress for rent, the landlord of such premises to whom any rent of such premises, may be due, may at any time before a sale of such goods by virtue of such execution, give notice to the party in whose favor such execution shall be issued, or to the officer holding the same, of the amount claimed by such landlord to be due, and the time during which the same accrued, and shall accompany such notice with his own affidavit, or that of his agent, of the truth thereof." 1 R. S. 737, § 12. With respect to the form of this notice, it was held in 12 Wen. 197, that a notice of rent due, was sufficient to justify the officer in retaining the sum claimed as rent, although the time during which the rent accrued, was not stated in the notice; but it was questioned by the court, whether the officer might not, for such defect, have disregarded the notice.

Form of notice to be given by landlord.

To James Jackson, the party, (or, George C. Loomis, the constable.)

You are hereby notified, that one hundred dollars is now due and owing to me, for the rent of the premises occupied by Richard Roe, in the town of Wilton, in the county of Saratoga, as my tenant, upon which premises were the goods and chattels liable to distress for rent, which have been levied upon by you, by virtue of an execution against the said Richard Roe, defendant, in favor of James Jackson, plaintiff. The said rent

accrued and became due, on the *first* day of *May* last, for the occupation of the said premises, by the said *Richard Roe*, from the *first* day of *May*, 1839, to the first day of *May*, 1840 ; and I claim to have the rent satisfied out of the first sales of the said goods and chattels. Dated *Saratoga Springs*, this 25th day of *January*, 1841. Yours, &c.

JOHN SMITH.

Form of affidavit to accompany above notice.

SARATOGA COUNTY, ss: JOHN SMITH, of *Saratoga Springs*, in said county, (or, *James Smith, of, &c., agent of John Smith,*) the landlord in the, annexed (or, *foregoing*) notice named, being duly sworn says, that the facts stated in the foregoing, (or, *annexed,*) notice are true.

JOHN SMITH, or
JAMES SMITH.

Sworn before me, this 25th }
day of January, 1841. }

W. A. BEACH, *Com. of deeds.*

"Upon receiving such notice and affidavit, the officer holding such execution, (unless prevented by the tenant of such premises executing a bond, as hereinafter provided,) shall levy the amount of the rent so claimed to be due, in addition to the sum directed to be raised on such execution, and shall pay such additional sum to such landlord, or his agent ; but the amount of rent to be levied under this section, shall not exceed the last year's rent of such premises." 1 R. S. 737, § 13.(1) Where there are two executions, the landlord cannot claim a year's rent on each, the intent of the statute being, only to continue a lien as to one year, and to punish the landlord for his laches, if he let more run in arrear. 2 Str. 1024. And where there is a year's rent due at the time of the levy, and the landlord omits to give notice, till after the accruing of another year's rent, he is entitled to *only one year's rent*, although subsequent to the accruing of the second year's rent, new executions are levied upon the property by another officer, and notice is given to him of the rent due. But it seems, that had the landlord given notice of his claim on the levy of the first execution, under which a sale takes place, and had given a like notice on the levy of the second execution, he would, in this way, have been entitled to *two years' rent*. 17 Wen. 34. The landlord may claim rent in advance, if it be stipulated in the lease,

(1) To maintain an action against an officer, for refusing to levy and pay over rent claimed by a landlord, an affidavit of the truth of the claim must be produced to the officer ; its non-production cannot be excused, although *waived by the officer* at the time of the claim, unless the tenant consent to a sale to satisfy the rent. 21 Wen. 65.

7 Price, 690; or rent which became due on the day the execution was put in, though the goods have been before distrained upon and replevied, Tidd, 1054, 8th ed.; but not rent which accrued after, and whilst the officer was in possession, unless the levy have been secret, 3 Wen. 446; the remedy against the officer, if he remain an unreasonable time in possession, being by action. 1 Maule & Selw. 245. This privilege, however, extends only to the immediate landlord, and the ground landlord cannot, therefore, claim his rent, on an execution against an under lessee. 2 Str. 787. 6 Wen. 393. And, in all cases, an existing tenancy must be proved, 5 Barn. & Ald. 88; or at least, an occupation by the tenant, and it is for the defendant to show that the rent has been paid. 7 Price, 690. With regard to what shall be considered *rent*, it has been held, that if an agreement for the assignment of a piece of ground, on payment of a certain sum, contain a clause, that the party agreeing to take the assignment, shall pay at the rate of so much *per annum*, from the time of taking possession, until the completion of the purchase, in equal half yearly payments, an officer has a right to treat such sum as rent, and deduct it out of the proceeds of the execution. 2 Carr. & Payne, 294; *et vid. addenda*, 12 Eng. Com. Law R. 425.(1)

"In case there shall be a deficiency of goods and chattels to satisfy both the execution and rent, the amount levied shall be first applied to the satisfaction of the rent, and the balance, if any, shall be applied upon the execution." 1 R. S. 738, § 14. If the plaintiff pay the rent, the constable may then levy both the rent and the sum due upon the execution, the lien for the rent being thus transferred from the landlord to the creditor upon the execution, or he may sell, and, first paying the landlord his rent, pay over the residue to the plaintiff, who is entitled, in an action against the constable, to recover the balance only, remaining in his hands. 12 John. 379.

"If any tenant against whom an execution shall be issued, shall deny that rent is due to his landlord, as claimed, he may prevent the levying thereof by virtue of such execution, by delivering to the officer holding such execution, a bond, with two sufficient sureties, to be approved by such officer, in a penalty double the amount of the rent so claimed, to be executed to such landlord, with a condition that the obligors therein will pay all rent then due to such landlord, not exceeding one year's rent of the premises." 1 R. S. 738, § 15. The bond mentioned in this section may be in the following form:

(1) The mere occupation of premises, without an agreement to pay a certain sum as rent, does not give the landlord a right to require an officer to levy and pay over whatever sum he chooses to demand. 21 Wen. 65.

Form of bond by tenant and sureties, to prevent levy for rent.

Know all men by these presents, that we, *Richard Roe, John Doe and Thomas Noakes*, of, &c. are held and firmly bound to *John Smith*, (the landlord,) of, &c. in the sum of, &c. (*double the amount of rent claimed*.) to be paid to the said *John Smith*, his executors, administrators or assigns; to which payment, well and truly to made, we bind ourselves jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated the 25th day of *January*, 1841.

Whereas *George C. Loomis*, one of the constables of the county of *Saratoga*, has levied upon and seized certain goods and chattels, the property of the above bounden *Richard Roe*, by virtue of an execution issued by *Ransom Cook*, Esq. one of the justices of the peace of the said county, upon a judgment rendered by the said justice, in favor of *James Jackson*, against the said *Richard Roe*. And whereas, the said *John Smith* claims that there is due to him the sum of *one hundred dollars* as rent, for the occupation of the premises upon which the said goods and chattels were, when levied upon as aforesaid, and further claims to have the said rent satisfied out of the first sales of the said goods and chattels upon the said execution. And whereas, the said *Richard Roe* denies that rent is due to the said *John Smith*, as claimed, as aforesaid:

Now, therefore, the condition of this obligation is such, that if the above bounden *Richard Roe, John Doe and Thomas Noakes*, shall pay to the said *John Smith* all the rent now due him from the said *Richard Roe*, not exceeding one year's rent of the premises above mentioned, then this obligation to be void; otherwise of force.

RICHARD ROE, [L. s.]

JOHN DOE, [L. s.]

THOMAS NOAKES, [L. s.]

Sealed and delivered }
in presence of }
GEO. C. LOOMIS.

"Upon such bond being executed and delivered, the officer holding such execution shall proceed in the collection thereof, notwithstanding any claim or notice of claim, for rent, which may have been made or given; and he shall deliver such bond to the landlord making such claim, or his agent, who shall be authorized to prosecute the same for the recovery of the rent due him." 1 R. S. 738, § 16.

"If any landlord shall, under the foregoing provisions, claim more rent than is due to him, and such excess shall be collected as above provided, the tenant may maintain an action against such landlord for such excess ; and if he recover therein, shall be entitled to judgment for double the amount of such excess." 1 R. S. 738, § 17.

The landlord cannot distrain the goods, nor can a collector take them for taxes due from the debtor, after they are levied on by the execution, for they are then in the custody of the law.(p)

If, under the foregoing provisions of the statute, the constable sell upon the execution, without regarding the claim for rent, where due notice is given and the tenant does not give the bond, the officer is accountable to the landlord in an action on the case,(q) at the suit of the landlord, or his representatives.(r)

The statute provides that no constable or other officer shall, directly or indirectly, purchase any goods or chattels, at any sale made by him, upon execution ; but that every such purchase shall be absolutely void.(s)

For want of goods and chattels whereon to levy, the constable, in the cases authorized by law, is, if the execution require it, to take the body of the person against whom the execution is issued, and convey him to the common jail of the city or county, the keeper whereof is required to keep such person in safe custody, in jail, until the debt, or damages and costs, are paid, or until he be thence discharged, by due course of law. (t)

The privilege from arrest on an execution, is the same as that on a warrant, to which we gave a very full consideration, ante, 508 to 514, under the heads of *personal*, *temporary* and *local privilege* ; and the rights and duties of the constable as to making the arrest, and his conduct after it is made, is, in general, the same as we noticed in relation to an arrest upon a warrant, ante, 514, 15. Thus, a person attending as a witness, has been held privileged from an arrest on a *ca. sa.*(u) So, one who attends as a party.(v) And although attorneys, counsellors, and other officers of the higher courts, were always liable to be taken in execution ; yet, if attending court on business, they may be discharged from such arrest by the court ; and so, they may be discharged by a judge at the circuit or sittings. But they are thus relievable from arrest, only on motion, and under the circumstances of the case ; and a sheriff or constable,

(p) 17 John. 128. Vid. also 20 Wen. 41.

(q) Vid. Woodf. Land. and Ten. 563,
4. 14 Wen. 123. Ante, 363, 1079, note.

(r) 1 Str. 212.

(s) 2 R. S. 181, § 147.

(t) Id. § 148.

(u) 4 Dall. 386. 10 John. 93.

(v) 4 Dall. 389, per Peters, J. 10 John. 93.

having them in custody on a *ca. sa.* or other execution, cannot discharge them, even though they produce their writ of privilege, but must await the order of the court ;(w) and if they are discharged without this order, the officer is liable, as for an escape.(x) But, generally, in other cases of privilege, they may discharge without such order.(y) And, accordingly, where the constable took the defendant in execution, who was privileged as a soldier of the United States,(z) it was held that he might discharge the defendant of his own head, and that no action lay against him.(a)

The plaintiff may, if he pleases, direct the constable to take security for the debt, rather than carry to jail ; and where the constable, under such a direction, took a promise from a third person, endorsed on the execution in these words, "*I promise to pay the amount of this execution, in the life, value received ;*" it was held a valid promise to pay the execution to the plaintiff, whether the defendant knew of the authority or not, and that the words "*value received*" imported, *prima facie*, a sufficient consideration.(b)

The constable should in no case arrest the debtor, where he can find any property liable to be seized on the execution. If he cannot find enough to satisfy the demand, he should, nevertheless, sell what there is, before making an arrest. He should, moreover, make diligent search for goods before he is authorized to seize the person of the debtor. In *Hollister v. Johnson*, 4 Wen. 639, 641, 642, the court say : "It is the duty of a constable in all cases to search for property to satisfy an execution, before he takes the person of the defendant." "This right to take the body, depends upon the contingency of there being no property to be found. If, without searching or enquiring for property, he immediately upon receiving the execution arrests the defendant, he does it at his peril ; and if it is shown that the defendant had property in his open and visible possession, which was subject to the execution, and might, with reasonable diligence, have been found by the officer, he is undoubtedly liable to an action for making the arrest." "A constable has, in all cases, a reasonable time to search for property before he is bound to arrest the defendant in the execution ; and if he acts in good faith, he will incur no responsibility in omitting to take the body until such search can be made. This necessarily follows from what has already been said as to the duty of the constable under the execution. There may be cases

(w) 19 John. 52.

(x) *Id.*

(y) 10 *id.* 93.

(z) *Ante*, 510.

(a) 11 John. 433.

(b) 14 *id.* 466.

in which no actual search is necessary. Where the defendant in the execution declares that he has no property, he has no right to complain if the constable credits his assertion, and proceeds accordingly."

On making the arrest, the defendant, (unless he pay the money,) is to be carried to the keeper of the common jail, who is bound to receive and keep him, till duly discharged. If the prisoner have a family in this state, for which he provides, and be not a freeholder, he is to remain in prison thirty days—sixty days, where he has neither family nor freehold. If a freeholder, he must remain till the demand is paid. Before entitled to his discharge, in the first two instances, he must make affidavit before some officer authorized to take affidavits, stating the facts which entitle him to be discharged.(c)

Form of affidavit to obtain discharge from jail.

JUSTICE'S COURT.

Richard Roe
ads. } Before Ransom Cook, Esq. Justice.
James Jackson. }

SARATOGA COUNTY, ss. *Richard Roe*, the above named defendant, being duly sworn says, that he has a family in this state for which he provides, (or, *that he has no family*), and that he is not a freeholder, and that he has remained in prison, in the jail of the said county, (or, *on the liberties of the jail, &c.*) thirty, (or, *sixty*) days, on an execution issued in the above cause.

RICHARD ROE.

Sworn before me, this 12th }
day of January, 1841. }

GEO. G. SCOTT, *Justice of the Peace.*

On delivering this affidavit to the sheriff or jailer, he is bound to discharge the prisoner forthwith, and cannot object, that he has sworn falsely, though this be the case, within the knowledge of the sheriff or jailer; for the affidavit operates as a complete protection against any action for the escape, brought either against the sheriff, or the bail for the jail liberties, whether it be true or false; and the party is left to his remedy against the debtor. If he has sworn false, he is liable to an indictment and conviction for perjury; and may then be re-imprisoned.

(c) 2 R. S. 181, § 149, 150. That he issued by the clerk of the county, upon a may be discharged upon this affidavit, transcript, vid. 5 Wen. 568. where he is imprisoned on an execution

But this discharge does not at all prejudice the right to another execution against the goods and chattels of the prisoner.(d) The sheriff or jailer is to file the affidavit in the office of the county clerk, who is to file it without fee or reward.(e) And if the sheriff or jailer, upon the receipt of the affidavit, refuse to discharge the prisoner, he is liable to an action for false imprisonment, and in addition, forfeits \$25 for each day he detains the prisoner, to be recovered, with costs, by the party aggrieved, to his own use.(f)

A justice, as such, has no authority to discharge a prisoner in execution; and, if a constable discharge him by order of the justice, he is, notwithstanding, liable for the escape.(g) Nor, has an attorney, retained merely to prosecute the suit, any power to grant such discharge.(h) A plaintiff in a *qui tam* action, cannot discharge the defendant from execution, merely on payment of the plaintiff's share, without the other moiety. Such discharge would be no protection to the constable.(i) The constable is required by statute,(j) to return the execution and pay the debt or damages and costs levied, to the justice who issued the same, returning the overplus, if any, to the person against whom the execution issued.

Form of constable's return to an execution.

I have levied the within sum, of the goods and chattels of the within named *Richard Roe*, as I am within commanded. Levied of goods and chattels.

I have levied *ten dollars*, parcel of the sum within mentioned, of the goods and chattels of the within named *Richard Roe*, and, no goods or chattels being found, whereof I could levy the residue thereof, I have committed his body to the common jail, as I am within commanded. Part levied of goods, &c. and commitment for residue.

No goods or chattels of the within named *Richard Roe* could be found whereon to levy; I, therefore, took and conveyed his body to the common jail, as I am within commanded. Commitment generally.

(d) 2 R. S. 181, § 150, 152, 154, 155. 11 John. 174. (h) 8 id. 361, 10 id. 220, and vid. 6 id. 51. Vid. 21 Wen. 362.
 (e) 2 R. S. 181, § 152. (i) 11 id. 474.
 (f) Id. § 153. (j) 2 R. S. 181, § 146.
 (g) 9 John. 146.

No property
nor body.

I could not find either property or body, according to the command of the within precept.

Part levied of
goods, &c. and
no body to be
found.

I have levied *ten dollars*, parcel of the sum within mentioned, of the goods and chattels of the within named *Richard Roe*; no more goods or chattels, or the body to be found.

Levied on
goods, &c.
which remain
unsold.

I have levied on one *bay horse*, the property of the within named *Richard Roe*, which remains on my hands, unsold for want of bidders.

Add the proper date and signature of the constable.

The endorsement to be made upon an execution, under the provision of the statute, cited ante, 1042, note (1), may be in the following form :

Form of endorsement on execution, where judgment is for certain statute penalties.

The cause for which the within mentioned judgment was rendered, was for selling one gill of rum, to be drank in the house of the within named *Richard Roe*, contrary to the provisions of sec. 16, title 9, chap. 20, of the first part of the revised statutes, without having such license therefor, as is required, in and by the fourth section of the said title. Dated &c.

This endorsement must be varied according to the circumstances of each case, and should state, substantially, the cause for which the judgment was rendered, as contained in the declaration.

The better opinion seems to be, that a constable, sheriff, &c. cannot serve his own execution himself; nor can a plaintiff be deputed to do this. And if a sheriff has not this power himself, whether he can give power by deputation to execute such process in his own name? Quere. (k)

(k) Vid. 4 John. 486. Cro. Car. 416. ton's Sh'ff. 97. Bac. Abr. tit. Sheriff, (M) 19 Viner, 443, note. Moore, 547. Dal-

SECTION V.

OF THE LIABILITY OF THE CONSTABLE AND HIS SURETIES; AND OF THE CONSTABLE'S LIABILITY FOR SUFFERING AN ESCAPE FROM EXECUTION.

It is provided by statute,^(l) that every person chosen or appointed to the office of constable, before he enters on the duties of his office, and within eight days after he shall be notified of his election or appointment, shall execute, in the presence of the supervisor or town clerk, with one or more sureties, to be approved of by such supervisor or town clerk, an instrument in writing, by which such constable and his sureties shall jointly and severally agree to pay to each and every person who may be entitled thereto, all such sums of money as the said constable may become liable to pay, on account of any execution which shall be delivered to him for collection. The supervisor or town clerk is to endorse on such instrument his approbation of the sureties therein named, and file it in the town clerk's office; and a copy of the instrument, certified by the town clerk, is presumptive evidence, in all courts, of the execution thereof.^(m)

It will be seen that the foregoing provisions do not prescribe the *form*, but merely the *substance* of the *security* or *instrument in writing* to be given; and hence the courts have been liberal in construing the statute, allowing great latitude as to form, in order to promote the beneficial objects of the legislature. The statute above cited, so far as regards the form of the instrument, is a re-enactment of the act of 1813,⁽ⁿ⁾ under which it has been held, that the security required *may* be in the form of a *penal bond to the people*;^(o) and, in one case, a simple engagement, without seal, that all papers that should come into the hands of the constable should be well and faithfully executed by him, and that he should collect and pay over all executions that are collectable, and that the signers will be accountable to all persons in whose favor any execution may come, for the damages in the same, if not paid over to him or them, according to the statute, &c. was held a valid instrument within the statute.

(l) 1 R. S. 340, § 30, 31.

(m) For the form of the town clerk's certificate, *vid. ante*, 926.

(n) 2 Laws of 1813, p. 126.

(o) 2 Wen. 281. 5 *id.* 191. 9 *id.* 223.

ute.(p) But in *Warner v. Racey*,(q) a bond "*to the people of Niagara county*," was held to be not according to the statute.

The approved form is, a simple agreement without any penalty, to pay to any person who may be aggrieved by the constable's neglect of duty.(r)

Form of instrument to be given by a constable and his sureties.

George C. Loomis, chosen, (or, *appointed*,) constable of the town of *Saratoga Springs*, county of *Saratoga*, and *Ezra Hall* and *James M. Marvin*, as sureties, do hereby jointly and severally agree to pay to each and every person who may be entitled thereto, all such sums of money as the said constable may become liable to pay, on account of any execution which shall be delivered to him for collection. Dated the — day of —, 18—.

GEO. C. LOOMIS, [L. S.]

EZRA HALL, [L. S.]

JAS. M. MARVIN, [L. S.]

Executed in the presence of, and }
the sureties approved by, }

SAMUEL CHAPMAN, Supervisor of *Saratoga Springs*, or,

S. R. OSTRANDER, Town-clerk of *Saratoga Springs*.

The omission to file the instrument within the eight days prescribed by the statute does not affect its validity ; in this respect, the statute is merely directory.(s) Nor can the constable, or his sureties, object that the instrument is not *under seal* ; nor in the *form* prescribed by the statute ; nor that the *sureties were not approved* by the clerk or supervisor.(t)

If an execution is delivered to a constable, he cannot avoid any liability which may subsequently accrue upon it, by delivering it over to another officer. An execution is an entire thing, and the officer who commences, is bound to finish its execution.(u)

In regard to the acts or omissions for which a constable is made liable, and for which the above security is intended as an indemnity, it is provided, that if a constable neglect to return an execution, within five days after the return day thereof, the party in whose favor the same was issued, may maintain an action of debt against such constable, and shall

(p) 12 Wen. 306.

(q) 20 John. 74. Vid. 2 Wen. 615,
per Savage, C. J.

(r) Per Marcy, J. 5 Wen. 191, 197.

(s) 2 Wen. 615.

(t) 12 id. 306. Vid. also 14 John. 401.

(u) 1 Yerg. 148.

recover therein the amount of the execution, with interest from the time of the rendition of the judgment upon which the same was issued ; and if a judgment be obtained in such suit against the constable, execution shall immediately issue thereon.(v) And it is further provided, that if moneys be collected by a constable upon an execution, and not paid over by him according to law, an action of assumpsit may be maintained by the party entitled to such money, in his own name, upon the instrument of security given by such constable and his sureties, and in such suit, the amount so collected, with interest from the time of collection, shall be recovered. Execution shall be immediately issued upon the judgment in such suit.(w)

Actions upon the constable's instrument of security, against him or his sureties, must be prosecuted within two years after the expiration of the year for which the constable was elected.(x) This is only where the suit is *upon the instrument* ; there can be no doubt that the constable himself would be held liable, in an action for *money had and received*, brought by the party on whose execution he had collected money, if the suit is brought before the claim becomes barred by the statute of limitations.

Where the instrument of security is in the form of a bond *to the people*, an action of *debt* in the name of the people, but not in the name of the party aggrieved, may be maintained by any person to whom the constable has become liable ; although *covenant* may be brought by such person on the *condition* of the bond in his own name.(y) And it is not necessary to obtain leave, from any court, to prosecute such a bond.(z)

The responsibility of the sureties is held to be co-extensive with that of the constable, and that they are liable whenever he is liable to a party in whose favor an execution has been delivered to him ; hence an action lies upon the constable's instrument of security, against the constable and his sureties, for the *mere neglect to return* an execution within five days after the return day thereof, and this, without showing any moneys collected.(a)

It will be seen, from the principle of the case last cited, that the responsibility of the constable and his sureties is sufficiently broad to cover all the constable's liabilities to parties who may be affected by his misconduct in relation to executions. If he make a false return ; as if he return to an execution, *no goods found*, when the defendant has property

(v) 2 R. S. 182, § 157.

(w) Id. § 161.

(x) 1 R. S. 340, § 32.

(y) 5 Wen. 191. Vid. 4 id. 414. 9

(z) 2 id. 281.

(a) 10 Wen. 370. For the form of the declaration in this case, vid. ante, 600.

id. 233.

in his open and visible possession, he is liable to an action on the case.(b) And this action for falsely returning *no goods found*, may be maintained even after the defendant is taken and imprisoned on execution in the same cause.(c) If he neglect to return an execution within the time limited by statute, or neglect to pay over moneys collected upon an execution, an action lies against him, as we have just seen.

The constable is moreover liable to an action for suffering an escape from execution;(d) and the action must be brought within one year from the time of the escape.(1) The doctrine, as to what constitutes an arrest upon an execution, is the same as that mentioned ante, 336, 7, 8; and the distinction between voluntary and negligent escapes, there noticed, is also applicable here.

If the plaintiff consent that the defendant be discharged, or that he go out of the custody of the constable, or off the jail limits, the judgment is thereby discharged, and the debt forever extinguished, unless, indeed, such consent be obtained fraudulently;(e) but where the debtor has once escaped, the plaintiff's consent that he may remain at large, will not discharge the judgment, nor protect the officer against an action for the escape.(f)

A voluntary return, or recaption of the prisoner, where the escape was not voluntary, constitutes a good defence, if such return or recaption were before suit commenced.(g) For what shall be deemed the commencement of the suit, vid. ante, 451, 495, 6.

The plaintiff, in this action, must prove both the judgment and execution; but it is no defence that there happens to be a variance between them in amount.(h) The form of the action should be debt.(i)

Although the constable has thirty or ninety days within which to take the body, yet if he do this at any time before the return day of the execution, and let the defendant go at large, it is a voluntary escape, and the constable is liable for the debt, though the defendant agree to return within the thirty or ninety days. In the case which decides this, the action was commenced against the constable while the defendant was at large; but it is conceived that it would make no difference, whether brought before or after return and commitment; for it is settled, that a voluntary escape cannot be purged by a return and recaption; the officer has no right to detain his former prisoner.(j) It is the duty of the officer, on arresting

(b) Ante, 338, 339, 504, 1001.

(c) 1 Campb. 323.

(d) Vid. ante, 600, 336, 649, 1000.

(1) 2 R. S. 224, § 21. Ante, 649.

(e) 13 John. 181.

(f) Id.

(g) Ante, 338. Vid 10 John. 563. 2

R. S. 356, § 67. As to pleading a voluntary return or recaption, vid. 2 R. S. 356, § 67.

(h) 5 John. 89.

(i) 13 id. 191. Ante, 600. But vid.

7 Wen. 237, 8, per Nelson, J.

(j) 13 John. 503. Vid. ante, 337, 8.

the prisoner, to convey him, on such route as shall seem to him the best and safest, directly to jail ; and it is said, that if he go a great way round to accommodate the prisoner, it is an escape. *(k)* So, if the prisoner go back, &c. *(l)*

In an action against the sheriff for an escape, though the plaintiff declare expressly for an escape from the jail liberties, it is sufficient, *prima facie*, to sustain the action, for him to prove that the prisoner was at large, walking the streets, or at a tavern in the neighborhood of the jail, or the like ; and it then lies upon the defendant to show the jail liberties, and that they encompassed the place where the prisoner was seen at large. *(m)*

For the provisions of the statute in regard to escapes, vid. 2 R. S. 351 to 356. Vid. also 3 id. 746, 747, notes by revisers.

In an action of debt against the constable for an escape, he is not liable for interest on the sum demanded, but only the simple amount of the execution ; for the debt is in the nature of a penalty. *(n)* And so of an action of debt for an escape, against the sheriff. *(o)* The plaintiff is, however, entitled to recover, as a part of the debt, the poundage and other fees for serving the execution ; for he would have a right to recover this in an action of debt on the judgment, against the defendant who escaped. *(p)* But if the plaintiff bring an action on the case, as he has a right to do, he may then recover his interest, as well as the debt, provided he make so much damages appear, and he may also be limited to his actual damages, which may fall short of the debt. *(q)*

Where an officer has an execution to collect, he may forbear to arrest the defendant, or take his goods ; and instead thereof, he may take the defendant's note, or other security, for the debt ; and if this be afterwards approved of by the plaintiff, the note is valid, though he have no *previous* authority to do this ; and it would be the same in effect, though he should release the defendant's goods, or his person from arrest, and take such security, if afterwards approved of by the plaintiff ; and I think all this clearly deducible from the case of *Sugars v. Brinkworth*. *(r)*

Where the constable suffers a voluntary escape, in consequence of which he is obliged to pay the debt, yet he cannot recover over against the defendant, *(s)* unless, indeed, upon a subsequent promise to pay, after the escape. *(t)*

(k) 1 Mod. 116.

(l) Id.

(m) 7 John. 165.

(n) 14 John. 255.

(o) 2 id. 45. W. Bl. 1048.

(p) 2 T. R. 126. 7 Mass. R. 377.

(q) 2 John. 45.

(r) 4 Campb. 46.

(s) 14 John. 362. Ante, 148.

(t) 14 John. 378.

CHAPTER XVI.

Of Certiorari and Appeal.

As the proceedings upon certiorari and appeal must, of necessity, be, in the main, conducted by gentlemen of the legal profession, whose books contain the proper directions in this department, I shall confine myself on this head to such particulars only, as relate to the official duty of the magistrate, and the effect of the certiorari and appeal upon the execution in the cause. For forms of the affidavit, bond, approval and writ of certiorari, vid. Clerk's Assistant, ed. of 1834, pp. 252, 3, 4. Edw. Treat. 3d ed. 182 to 186.

SECTION I.

OF CERTIORARI.

In all cases where the debt or damages recovered, do not exceed twenty-five dollars, exclusive of costs; or where no issue is joined, be the amount as it may, the method of reviewing and correcting the errors which may have intervened in the proceedings before the justice or jury, is, by writ of *certiorari*, from the court of common pleas of the county where the judgment was rendered.(a) But, notwithstanding the statute, such judgment may be removed to the supreme court, by leave obtained from that court, by special application, founded on affidavit.(b) The payment or settlement of a judgment will not prevent a certiorari, or supersede one already brought.(c) Whether a party can avoid a certiorari or ap-

(a) 2 R. S. 184, § 168.
(b) 5 Wen. 98.

(c) 1 Cowen, 437.

peal, by releasing the judgment, quere? At any rate, the justice cannot conclude the party, by returning this fact; for this would be going beyond his office.(d) It has been held, that if, previous to an appeal, the parties settle the judgment rendered by the justice, this fact cannot be pleaded *puis darrien continuance*, in the common pleas. The only way for the appellee to avail himself of this, is by motion to the common pleas, to quash the appeal. 17 Wen. 506. The same rule would probably prevail in cases of certiorari.

On receiving the writ of certiorari, it becomes the immediate duty of the justice to set about making his return, which he must make in writing, and file with the clerk of the county before the return day of the certiorari, or within ten days after the service thereof, where the return day is less than ten days after such service;(e) and although he may wait till the expiration of a rule to compel his return, of which he must have written notice from the attorney of the plaintiff in error, yet the safer way is to avail himself of his minutes and recollection in the first instance, and this, as well for the sake of justice and accuracy, as because he is liable, not only for any damages arising from a mistake in his return,(f) but perhaps also for such injury as the party might suffer by the delay.(g) And where the return of the justice was evasive, and his conduct disingenuous, the court ordered him to amend his return, and pay the costs of the application.(h) But the justice may refuse to make a return, if the preliminary steps required by the statute,(i) to be taken by the party applying for a certiorari, are not all complied with.(j)

In making the return, the justice is first to endorse the writ as follows :

Form of endorsement on writ.

The execution of this writ, appears by the schedule, hereunto annexed.

RANSOM COOK, Justice.

Schedule.

SARATOGA COUNTY, ss: I, Ransom Cook, the justice of the peace, in the writ hereto annexed, named, do certify to the judges of the court of common pleas of said county, that before the coming to me of the said writ, to wit, on the first day of January, 1840, at the request of *James Jackson*, in the said writ named, I issued a summons, directed to any constable of

(d) 14 John. 166.
(e) 2 R. S. 185, § 177.
(f) 14 John. 195.
(g) 15 id. 456.

(h) 1 Cowen, 582.
(i) 2 R. S. 184, § 169 to 175.
(j) Vid. 11 Wen. 174, 5. 7 id. 516, 517.

the said county, commanding him to summon *Richard Roe*, in the said writ also named, to appear before me, at my office, in the town of *Saratoga Springs*, on the 13th day of January, then inst. at one o'clock in the afternoon, to answer *James Jackson*, in a plea of trespass on the case, to his damage of fifty dollars; which summons, on or before the return day thereof, was delivered to me by *George C. Loomis*, a constable of the said county, with a return thereon, signed by him, that the same was personally served on the said *Richard Roe*, on the sixth day of January aforesaid. And I do also certify, that at the time and place above specified, for the return of the same summons, the said parties appeared before me, and the said plaintiff declared against the said defendant, in assumpsit, for twenty bushels of wheat, sold and delivered by the plaintiff to the defendant, at his request, at *Saratoga Springs*, in said county, in the year 1839, to his damage \$25; to which declaration the said defendant pleaded the general issue. (*If the pleadings of the parties are in writing, insert copies of them.*) And issue being so joined between the said parties, the plaintiff demanded of me, that the said cause should be tried by a jury; and upon the motion and oath of the plaintiff, the said cause was adjourned until the twentieth day of January, then inst., at one o'clock in the afternoon, at my office, in the said town of *Saratoga Springs*; and I also issued a venire for a jury, returnable at the time and place last aforesaid.

And I do also certify, that on the day and at the place last aforesaid, the said parties appeared before me, and *George C. Loomis*, a constable of the said town of *Saratoga Springs*, returned the said venire to me, with a panel containing the names of twelve persons, summoned by him for the jury aforesaid, six of whom were duly drawn and sworn, (or *affirmed*,) as the jury to try the said cause, who did sit together and hear the proofs and allegations of the parties, which were delivered publicly, in their presence. And on the trial of the said cause, *A. B.*, a witness sworn on the part of the plaintiff, testified that, (*set forth the evidence given on the part of the plaintiff.*) And thereupon the plaintiff rested his cause. *C. D.*, a witness sworn for the defendant, testified that, (*set forth the evidence given on the part of the defendant.*) And I also certify, that the foregoing is all the testimony given on the said trial, and that the defendant, after the testimony on the part of the plaintiff was closed, applied to me for a nonsuit, in the said cause, which I refused to grant; and after hearing the proofs and allegations of the parties, the jury were kept together in a convenient place, under the charge of a constable for that purpose, duly sworn, until they had agreed upon their verdict; and when they had agreed upon their verdict, they returned into court, and delivered the same to me, publicly, the plaintiff appearing and

answering, whereby they found for the plaintiff, *twenty dollars* damages. Whereupon, I, the said justice, did render judgment against the said defendant, for the said *twenty dollars*, damages, and *two dollars* costs.

All which I send with the process, pleadings and other things touching the aforesaid proceedings and judgment, as by the said writ I am commanded.

Given under my hand and seal, the twelfth day of February, 1840.

RANSOM COOK, [L. s.]

The foregoing general form, is enough to inform the justice of the manner in which his return should be drawn. If the affidavit state, for error, that any evidence was improperly admitted or rejected; or that any of the proceedings in the cause were irregular &c., the justice should return specifically, in answer to such allegations in the affidavit. But where the affidavit on which the certiorari is allowed, and which is served on the justice at the same time with the writ, states matter foreign to the direct command of the writ, and the justice omits to return thereto, the only way to compel an amendment, is by a rule to be obtained on application, and served on the justice. And unless this be done, the party cannot avail himself of such matter in the court above.^(k) And even though no evidence be returned, it is no cause for reversing the judgment: the error must appear affirmatively upon the return.^(l)

The justice cannot move to quash the writ of certiorari. Its irregularity is none of his concern, and he must obey it at his peril, returning what is legally required of him, and omitting to notice what he is not legally bound to return.^(m) He must in his return, truly and fully answer to all the facts set forth in the affidavit,⁽ⁿ⁾ and the return, must of itself contain a complete history of the proceedings in the cause, without reference to the affidavit on which the certiorari is founded;^(o) nor will the justice be excused, on his affidavit that he has no minutes, and remembers nothing by which he can so return.^(p) The return should also contain every thing necessary to confer jurisdiction on the justice; and where it did not appear from it, that the summons contained any *time* or *place* of appearance, or that the return of the constable showed the *time of service* of the process, the return was held insufficient.^(q) It should be made by the justice himself, and where it was drawn by the attorney for the plaintiff in error, it was set aside;^(r) so where a justice at

(k) 3 John. 439. 12 id. 299. 19 Wen. 351, 353.

(l) 12 Id. 299. 19 Wen. 351, and vid. 21 Wen. 307.

(m) 2 John. Cas. 108. Rut vid. ante, 093.

(n) 2 R. S. 185, § 177.

(o) 3 Cowen, 61.

(p) 1 Cowen, 59.

(q) 17 Wen. 517.

(r) 3 Cowen, 20.

the request of the attorney of a party, and in his absence, drew up the affidavit for a certiorari, and also prepared the other necessary preliminary papers, a mandamus was ordered to quash the certiorari.(s) But where the attorney for the plaintiff in error, at the request of the justice who dictated the whole of the facts, wrote the return, and acted merely as an amanuensis or clerk for the justice, the court refused to set aside the return;(t) so where the attorney for the defendant in error, wrote the return, the court refused to set it aside, no abuse being shown, for the reason that the defendant's attorney was seeking for the affirmance of the judgment, which is more favored in law.(u) The return need not be under seal; it is enough if it be under the hand of the justice, and an action for a false return, will lie against the justice, upon such a return, as well as if it were sealed.(v) The justice should also be careful to give a full history of all such matters as are essential to give his proceedings the character of regularity, and adherence to the statute. Thus, if he state that the jury retired to deliberate on their verdict, he must also return that a constable was sworn to attend them; and should he omit this, the judgment would be reversed.(w) And where issue is joined, the return should, upon the same principle, state, that the judgment was rendered after "hearing the proofs and allegations of the parties."(x) But the justice cannot be required to state matters of which he is not presumed to be conversant; as the conduct of a jury after they have retired.(y) And the court will not require him to return any matter which is altogether immaterial; for instance, a notice of special matter, which might have been given in evidence under the general issue, without such notice.(z)

The court of review will, in all cases, put such a construction on the words and phrases used in the return, as will tend to the affirmance, rather than the reversal of the judgment; and will make every warrantable intendment in its favour. Accordingly, where the return omits to state, that the witnesses were sworn, it will be intended that they were, if no objection appear to have been made on this account before the justice.(a) So where a greater amount of costs was taxed than is ordinarily allowed by law, the court intended, in the absence of the facts so appearing in the return, that the costs were legally increased beyond the ordinary sum, by the addition of charges for the attendance of foreign witnesses.(b) When the court of review may, on certiorari, con-

(s) 18 Wen. 550.

(t) 4 Cowen, 505.

(u) Id. 537.

(v) 1 Id. 212.

(w) 2 Caines, 373. Id. 134.

(x) Id. 96.

(y) 3 id. 106.

(z) Id. 84.

(a) 2 John. 378.

(b) 19 Wen. 351, and vid. 21 Wen. 305, 7.

sider the weight of evidence, *vid. ante*, 987, 8. And where a justice returned, "that, being convinced by the evidence adduced by the plaintiff, he gave judgment," &c., the court intended that this was legal evidence, given under oath.(c) They will not require a technical issue to be returned, though the cause be tried by jury, to warrant which, as we have seen,(d) an issue is essential; but where it appeared by the return, that the defendant, in some shape or other, resisted the plaintiff's demand, this will be considered equivalent to the joining of an issue.(e)

A justice may, after the expiration of his office, make a return to a certiorari or appeal brought on a judgment rendered by him while in office, in like manner and with like effect as if served on him before the expiration of his term;(f) and if the justice to whom a certiorari is directed be dead, insane, or have removed out of the state, so that a return cannot be compelled, the court may receive the affidavits of witnesses and of the parties, to the facts and circumstances of the trial or judgment upon which the certiorari is brought, and shall proceed thereon in the same manner as if such facts had been returned by the justice.(g) But if a justice before whom a judgment shall have been rendered, shall remove out of the county, the court of common pleas of the county, upon proof of the facts, may, by mandamus, compel a return to a certiorari or appeal brought upon such judgment.(h)

We have already had occasion to mention incidentally, the subject of amending the justice's return. This motion to the common pleas to amend, is, either by the party, where the return is imperfect, in order to compel the justice to supply the defect;(i) or else, it may be made in behalf of the justice, where he has committed a mistake from the management or imposition of the party or his attorney, or, indeed, where the mistake happens from any other cause.(j) In the latter case, the return may thus be corrected, either in behalf of the justice, or of the party with his consent, upon an affidavit, which should always state the precise point in which the amendment is sought, in order to enable the court to judge of its materiality.(k) The rules should also contain the particulars, in which such amendment is to be made, in order to instruct the justice where to amend in his own behalf, or to compel an amendment in behalf of the party.

(c) 3 John. 439.

(d) *Ante*, 834, 880.

(e) 1 John. Cas. 333.

(f) 2 R. S. 198, § 280.

(g) *Id.* § 262.

(h) *Id.* § 266.

(i) 3 John. 439. 2 Caines, 384. 1 *id.* 501.

(j) 2 Caines, 139. 5 John. 350.

(k) 3 Caines, 136.

And, unless this is the case, it is presumed that the rule would be a nullity. In the first case, the justice should procure an office copy of the rule for his own sake ; in the latter, it must be served on him by the party, before he can be compelled to amend. Where the return is imperfect, the justice may, by arrangement between the parties, gratuitously make a supplementary return, supplying the defect ; but where a motion is made to amend, the usual notice of the motion, &c., must be given to the opposite party.(*l*) Where a justice made a supplementary return, and then another return contradicting it, the court refused to receive either, and proceeded upon the first.(*m*) And where he had given a certificate of proceedings in the cause, and afterwards contradicted them by affidavit, the court refused an order to amend, according to the certificate.(*n*) And in all cases, where the first return is precise, specific and full, a further return cannot be obtained by the party on making an affidavit supplementary to the one on which the certiorari was founded.(*o*)

These amendments may be ordered at different stages of the suit, according to the circumstances of the case, and the person applying. In one case, a justice was allowed to amend a clerical mistake, on payment of costs, even after the cause had been argued, and the opinion of the supreme court had been delivered, reversing the judgment.(*p*) In another case, he was allowed to amend, after the cause had been noticed for argument, upon an affidavit that he was led into the mistake by the management and imposition of the plaintiff's attorney.(*q*) And the defendant will be allowed, under special circumstances, to move for the amendment of a clerical mistake, even after a joinder in error.(*r*) But the plaintiff cannot, in general, move to amend after an assignment of errors, and especially, after noticing the cause for argument.(*s*) But the manner, time, &c. in which a party must apply to the court to have the justice's return amended, and the practice and proceedings thereon, are now generally regulated by the rules of the different courts of common pleas, it being provided by statute, that they shall have the power to compel the justice to make or amend his return, by rule, attachment or mandamus, as the case may require.(*t*) And no assignment of errors or joinder in error is now necessary,(*1*) except where error of fact is assigned.

It is not necessary on service of the rule to amend, to make out a new return complete. It may be done with less trouble, and with equal effect by a supplemental return.

(*l*) 2 Caines, 258. 5 John. 350.

(*m*) 7 John. 548.

(*n*) 3 Caines, 84.

(*o*) 2 John. 182.

(*p*) 2 Caines, 134.

(*q*) 5 John. 350.

(*r*) 3 Caines, 83.

(*s*) 2 Caines, 383. 1 John. 493.

(*t*) 2 R. S. 185, § 179.

(*1*) 2 R. S. 185, § 180.

Form of an amended or supplemental return.

SARATOGA COMMON PLEAS.

Richard Roe, *pl'ff* in error, }
 v. }
 James Jackson, *def't* in error. }

Pursuant to a rule or order of the court of common pleas of the county of Saratoga, made on the fourth day of January inst. 1, *Ransom Cook*, the justice of the peace in the said rule or order named, do further certify and return to the writ of certiorari in this cause, and in compliance with the said rule that (*here set forth the facts.*) Given under my hand and seal the 20th day of January, 1840.

RANSOM COOK, [L. s.]

SECTION II.

OF THE EFFECT WHICH A CERTIORARI HAS UPON THE EXECUTION IN THE CAUSE.

If the certiorari, bond and affidavit are served on the justice before an execution is issued, such service stays the issuing of the same ; and if the execution has been issued, but not collected, the justice is to grant the party requiring it, a certificate of the issuing of such execution, which, on being served on the officer in whose hands the execution is, suspends the execution.(u)

Form of justice's certificate that a certiorari has been issued.

JUSTICE'S COURT.

James Jackson }
 v. }
 Richard Roe. }

I certify that a writ of certiorari has been duly issued and allowed on the judgment in this cause. Dated *Saratoga Springs*, January 1st, 1840.

RANSOM COOK, *Justice*.

On the service of this certificate, the officer is authorized to proceed no further.

But it was formerly held, that if the officer had begun the execution, before the certiorari was served, as by making a levy or arrest, the writ was no stay; and the execution might be completed.^(v) In such case, where the certiorari was served before the money, if collected on the execution, was paid over to the party, it was held that it ought to be paid in to the justice, to abide the event of the suit. A step like this was directed at the close of the case of *Meriton v. Stevens*.^(w) These cases, however, were decided upon the common law doctrine, that a writ of error will not operate as a supersedeas after levy made, and without any statute regulation on the subject. In *Wilson v. Williams*, decided since the revised statutes,^(x) Nelson, C. J. says, "An *appeal* stays all further proceedings on a judgment before the justice: if execution is already issued, the certificate of the justice that an appeal has been duly entered, requires the constable, *forthwith to release the goods and chattels*; and if imprisoned, the party is entitled to be discharged from imprisonment. The statute, it will be perceived, is explicit that the goods shall be released to the party from execution in the case of an *appeal*. It is not so explicit in its direction in the case of a *certiorari* being issued, but probably in legal effect it should be considered the same." The case does not, however, decide the point, and it is still left open to doubt. In the same case the question was raised, but not decided, whether property, held by virtue of an attachment, should be released by the constable on service of this certificate in cases of appeal and certiorari;^(y) nor have I been able to find any decision settling the point.

SECTION III.

OF APPEAL.

Any party to a judgment rendered by a justice of the peace, where the recovery shall exceed twenty-five dollars, exclusive of costs, conceiving himself aggrieved thereby, may appeal therefrom to the court of common pleas of the county where the same was rendered in the following

(v) 9 John. 66. 17 id. 35.
(w) Willes, 271 to 280.

(x) 18 Wen. 581, 582.
(y) 1d. 583.

cases: 1. Where the judgment was rendered upon an issue of law joined between the parties: 2. Where it was rendered upon an issue of fact joined between the parties, whether the defendant was present at the trial or not.(z)

Where the judgment does not exceed twenty-five dollars, exclusive of costs, there having been an issue joined; or where there has been no issue joined, let the amount of the judgment be what it may, the cause can be carried to the common pleas only by writ of certiorari: in all other cases an appeal is the proper remedy.

The affidavit of the party bringing the appeal, with the endorsement of the officer who allowed it, must be served on the justice within thirty days after the rendition of the judgment, a fee of seventy-five cents paid him for making and filing his return, and a bond in conformity with the following provisions delivered to him, otherwise the appeal shall not be valid nor have any effect.(a)

The requisites of the appeal bond are as follows: 1. It shall be in a penalty of at least one hundred dollars: 2. It shall recite the judgment, so as to exhibit the names of all the parties, the character in which they prosecuted or defended before the justice, the amount recovered, and the name of the justice: 3. It shall contain a condition, that the appellant will prosecute his appeal with all due diligence, to a decision in the court of common pleas; and that if a judgment be rendered against him in such court, he will pay the amount of such judgment, including the costs of the appeal, with interest thereon, within thirty days after such judgment rendered; or if his appeal shall be discontinued or dismissed, that he will pay the judgment recovered against him before the justice, and interest thereon, together with the costs of the appeal: 4. It shall be executed by the appellant, with one or more sufficient sureties, or by two or more sufficient sureties without the appellant; which sufficiency shall be certified by the justice on the bond.(b)

An action will lie against a justice who corruptly refuses to approve the surety in an appeal bond.(c)

Form of bond on appeal.

Know all men by these presents, that we, *Richard Roe*, of the town of *Saratoga Springs*, in the county of *Saratoga*, and *John Doe*, of the same place, are held and firmly bound unto *James Jackson*, of the place aforesaid, in the sum of one hundred dollars, to be paid to the said

(z) 2 R. S. 186, § 186.

(a) 2 R. S. 187, § 189, 190, 191.

(b) 2 R. S. 187, § 189. Vid. 5 Wen. 508.

(c) 8 Wen. 462.

James Jackson, or to his certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this *twelfth* day of *July*, one thousand eight hundred and *forty*.

Whereas, *James Jackson*, plaintiff, recovered a judgment against the above bounden *Richard Roe*, defendant, [*if the appellant does not sign the bond, omit the words, "the above bounden,"*] before *John B. Gilbert*, Esq. a justice of the peace of the county of *Saratoga*, for the sum of *thirty* dollars, and *fifty* cents damages, and *two* dollars and *twenty-five* cents costs of suit, and the said *Richard Roe* conceiving himself aggrieved by such judgment, hath appealed therefrom, to the court of common pleas, of the county aforesaid :

Now therefore the condition of this obligation is such, that if the said *Richard Roe* shall prosecute his appeal with all due diligence to a decision in the said court of common pleas, and in case a judgment be rendered against him in such court, if he shall pay the amount of such judgment including the costs of the appeal, with interest thereon, within thirty days after such judgment is rendered ; or, in case his appeal shall be discontinued, or dismissed, if he shall pay the judgment recovered against him before the said justice, and interest thereon, together with the costs of the appeal ; then the above obligation to be null and void, and of no effect, otherwise to remain in full force and virtue.

RICHARD ROE, [L. s.]

JOHN DOE, [L. s.]

Sealed and delivered, }
in presence of }

JOHN B. GILBERT.

Form of certificate of sufficiency of sureties, to be certified on the bond.

I certify that the surety in the within (or foregoing) bond is sufficient, and approve the same.

JOHN B. GILBERT, *Justice of the Peace.*

Within ten days after the appeal is made, the justice shall make a return of the proceedings had before him, to the court of common pleas of the county ; in which shall be stated, 1. The title of the cause, and the character in which the parties prosecuted or defended before him : 2. The demand of the plaintiff, and if his declaration was in writing, a copy thereof shall be set forth : 3. The plea of the defendant, and the notice of set off given by him, if any ; and if the same were in writing,

a copy to be set forth: 4. Any other proceedings of the parties, upon which an issue was formed, and the issue joined between them: 5. If the trial was by jury, the names of the jurors, and their verdict: 6. The judgment rendered thereon, and the time of rendering the same; and, 7. The time when the affidavit, allowance of appeal and bond were served, and the costs and fees of the justice were paid.(d)

Within ten days after the appeal is duly made, the justice must file in the office of the clerk of the court of common pleas of the county, his return made as above directed, together with all papers filed with him by either party, relating to the cause, and the original affidavit served on him, with the allowance of appeal endorsed thereon, and the bond delivered to him, by or on behalf of the appellant.(e)

Form of return to an appeal.

James Jackson }
v.
Richard Roe. }

An appeal having been made in the above cause, I, *John B. Gilbert*, the justice before whom the said cause was tried, do return to the court of common pleas of the county of Saratoga, the proceedings had before me therein, as follows:

That the parties prosecuted and defended in their individual character. (*If not so, state the character in which the parties did prosecute or defend.*) The plaintiff declared verbally in assumpsit for goods, wares and merchandize sold and delivered by him to the defendant, and for work, labor and services, by him performed for the defendant, and on the money counts generally, to plaintiff's damage of fifty dollars. Or, the plaintiff's declaration was in writing, of which the following is a copy. (*Here set it forth.*) The defendant pleaded verbally the general issue, and gave notice of set off substantially as follows. (*Here set forth the substance of defendant's plea and notice.*) Or, the defendant's plea and notice were in writing, and the following is a copy of the same. (*Here set forth copy of plea and notice.*)

That the trial of said cause was by jury, that the names of the jurors were, *John Smith, &c.* (*naming them,*) and that the jury found a verdict in favor of the plaintiff for *thirty dollars and fifty cents* damages. (*If the trial was not by jury, omit this last paragraph.*)

(d) 2 R. S. 187, 8, § 194.

(e) Id. 188, § 195.

That on the first day of July, 1840, judgment was rendered by me against the defendant, for

Damages, - - - - -	\$30,50
Costs, - - - - -	2,25
	<hr/>
	\$32,75

And I further certify, that the affidavit, allowance of appeal, and bond herewith returned, were served on me on the twelfth day of July instant, and that my costs and fees were at the same time paid. Dated the 25th day of July, 1840.

JOHN B. GILBERT, *Justice.*

If the justice refuses to make his return within the time prescribed by law, either the appellant or appellee may proceed in the court of common pleas to compel him so to do, in the manner pointed out by statute ; and upon an attachment being issued against a justice for refusing to make or amend his return, the court may punish his disobedience, by imprisonment, until he submit, and may adjudge that he pay the costs of the proceedings against him.(f)

The provisions of the statute as to a justice's making a return to an appeal brought after the expiration of his office, are similar to those noticed under the head of certiorari, ante, p. 1097.

Upon an appeal being made, all further proceedings on the judgment before the justice are superseded ; and if, in the mean time, execution has been issued, the justice is to give to the appellant, a certificate that an appeal in the cause has been duly made ; and on such certificate being presented to the constable holding the execution, he is forthwith to release the goods and chattels, or the body of the appellant, which may have been taken ; and if the appellant has been committed to prison, the jailer, upon service of the like certificate upon him, is to release the appellant from imprisonment.(g)

Under the above provision, it has been held, that when an appeal is made, and a certificate of the fact granted by the justice and served upon the constable, after execution issued, who has previously received the amount of the judgment under the execution, the constable is authorized to return the money to the appellant. Vid. 12 Wen. 584. And quere, whether the same rule would not apply to a like case where a certiorari is brought. Vid. ante, 1100.

(f) 2 R. S. 188, § 196, 7, 8, 9, 200.

(g) Id. 187, § 192, 3.

Form of justice's certificate that an appeal has been made.

James Jackson }
 v.
Richard Roe. }

I certify, that an appeal in this cause, to the court of common pleas of the county of *Saratoga*, has been duly made by the said *Richard Roe*. Dated *Saratoga Springs*, July 12th, 1840.

JOHN B. GILBERT, *Justice*.

For the provisions of the statute at large, in relation to certioraris and appeals, vid. 2 R. S. 184 to 191 ; vid. also id. 198.

The statutes, decisions and rules of practice relating to appeals after they have passed from the jurisdiction of the justice, when they are, in fact, treated as causes commenced in the higher courts, do not come within the scope of the present work.

CHAPTER XVII.

Of Amendments.

WE have had occasion to notice, incidentally, in various parts of the preceding pages, the justice's power of amending process, pleadings, &c. Vid. ante, 408, 490, 585, 6, 924, 989. As to his power of disregarding variances which might be amended, vid. ante, 923, 4, 989, 990. We propose, under this head, to treat the subject of amendments with more particular attention than has yet been bestowed upon it, even at the hazard of repeating many of our former remarks.

The statute of *amendments and jeofails*, passed February 20th, 1788, incorporated in the revised laws of 1813,^(h) was, with some alterations and additions, re-enacted in the revised statutes of 1830.⁽ⁱ⁾ This statute, which we insert at length, is as follows :

§ 1. The court in which any action shall be pending, shall have power to amend any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein. § 2. If such amendment be made to any pleading in matter of substance, the adverse party shall be allowed an opportunity, according to the course and practice of the court, to answer the pleading so amended. § 3. Process by which any action shall have been commenced, and on which any defendant shall have been arrested, shall not be amended in the return day thereof. § 4. After judgment rendered in any cause, any defects or imperfections, in matter of form, contained in the record, pleadings, process, entries, returns or other proceedings in such cause, may be rectified and amended by the court, in affirmance of the judgment, so that such judgment shall not be reversed or annulled ; and any variance in the record, from any process, pleading or proceeding had in such cause, shall be reformed and amended, according to such original process, pleading

(h) Vid. Laws of 1813, p. 117.

(i) 2 R. S. 343, 4, 5.

or proceeding. § 5. All returns made by any sheriff or other officer, or by any court or subordinate tribunal, to any court, may be amended, in matter of form, by the court to which such returns shall be made, in their discretion, as well before as after judgment. § 6. Any imperfection or defect in the award of any *venire*, or any omission to award such *venire* on the record, may be amended or supplied by the court in which such record is. § 7. When a verdict shall have been rendered in any cause, the judgment thereon shall not be stayed; nor shall the judgment upon such verdict, or any judgment upon confession, default, *nihil dicit* or *non sum informatus*, be reversed, impaired, or in any way affected, by reason of the following imperfections, omissions, defects, matters or things, or any of them, in the pleadings, process, proceedings or record, namely: 1. For want of any writ, original or judicial: 2. For any default or defect in process; or for misconceiving any process, or awarding the same to a wrong officer; or for the want of any suggestion for awarding process; or for any insufficient suggestion: 3. For any imperfect or insufficient return of any sheriff or other officer, or that the name of such officer is not set to any return actually made by him: 4. For any variance between the original writ, bill, plaint and declaration, or between either of them: 5. For any mispleading, miscontinuance, or discontinuance, insufficient pleading, lack of colour, jeofail, or misjoining of issue: 6. For the want of any warrant of attorney by either party, except in cases of judgment by confession, where such warrant is expressly required by law: 7. For any party under twenty-one years of age having appeared by attorney, if the verdict or judgment be for him: 8. For the want of any allegation or averment, on account of which omission, a special demurrer could have been maintained: 9. For omitting any allegation or averment of any matter, without proving which, the jury ought not to have given such verdict: 10. For any mistake in the name of any party or person; or in any sum of money; or in the description of any property; or in reciting or stating any day, month or year, when the correct name, time, sum or description, shall have been once rightly alleged, in any of the pleadings or proceedings: 11. For a mistake in the name of any juror or officer: 12. For the want of a right venue, if the cause was tried by a jury of the proper county: 13. For any informality in entering a judgment, or making up the record thereof, or in any continuance or other entry upon such record: 14. For any other default or negligence of any clerk or officer of the court, or of the parties, or their counsellors or attornies, by which neither party shall have been prejudiced. § 8. The omissions, imperfections, defects and variances in the preceding section enumerated, and all others of the like nature, not be-

ing against the right and justice of the matter of the suit, and not altering the issue between the parties, or the trial, shall be supplied and amended by the court, where the judgment shall be given, or by the court into which such judgment shall be removed by writ of error. § 9. No process, pleading or record shall be amended or impaired by the clerk or other officer of any court, or by any other person, without the order of such court, or of some other court of competent authority. § 10. The provisions of this title shall extend to all actions in courts of law, and to all suits for the recovery of any debt due to the people of this state, or for any debt, duty or revenue belonging to them ; and also to all actions for penalties and forfeitures ; to all writs of *mandamus* and prohibition ; to all informations in the nature of a *quo warranto* ; to writs of *scire facias*, and to the proceedings thereto.(1)

That the foregoing provisions extend to justices' courts, so far as they are applicable, is evident from the language of the last section, which, in express terms, extends them to *all actions in courts of law*. And, as if to leave no doubt on this subject, it is further provided by statute,(j) that every justice of the peace elected in any town of this state, or appointed for any city in which special courts are not established by law, is authorized to hold a court for the trial of all actions, &c., and to hear, try and determine the same, according to law and equity ; and for that purpose, where no special provision is otherwise made by law, *such court shall be vested with all the necessary powers which are possessed by courts of record in this state*. Vid. also 10 Wen. 213, 215. There being, then, no doubt as to the power of justices to allow amendments, the next subject of enquiry is, as to how far their authority in this respect may be legitimately extended ; and it is proper to observe, in the outset, that at com-

(1) The sections of the statute cited in the text, have particular reference to the process, pleadings and proceedings in suits commenced and pending. The following statutory provisions are important, as affecting various proceedings before justices of the peace, as well in the commencement and progress of actions, as in other matters of which they have cognizance : " Whenever a bond is or shall be required by law to be given by any person, in order to entitle him to any right or privilege conferred by law, or to commence any proceeding, it shall not be necessary for such bond to conform in all respects to the form thereof prescribed by any statute, but the same shall be deemed sufficient if it conform thereto substantially, and do not vary in any matter, to the prejudice of the rights of the party, to whom or for whose benefit such bond shall have been given. Whenever such bond shall be defective in any respect, the court, officer or body who would be authorized to receive the same, or to entertain any proceedings, in consequence of such bond, if the same had been perfect, may, on the application of all the obligors therein, amend the same in any respect ; and such bond shall thereupon be deemed valid from the time of the execution thereof." 2 R. S. 459, § 33, 34.

(j) 2 R. S. 153, § 1.

mon law and independently of the statute, the justice may allow amendments to be made, in certain cases, at the trial, as we noticed ante, 924. And while the parties are going on with their pleadings before him, in order to an issue, as the declaration, replication, &c. or the defendant's plea, notice of special matter, or set off, the justice may, without doubt, suffer the parties to amend from time to time, at his discretion, till the pleading or notice shall be perfect. Thus, should the defendant demur to my declaration and the justice think it insufficient, he may suffer me to amend, (k) and so of any other pleading or notice, adjudged, or supposed to be insufficient. And this is a power which ought to be freely and liberally exercised by the justice, where he believes the party acts in good faith; otherwise he might lose his cause, or fail in his defence, for mere want of skill, which the law itself, by sending him to this tribunal, does not suppose him to possess. And it is, moreover, greatly in case of the magistrate, who, if he has any doubts as to the goodness of the pleading demurred or objected to, can allow and direct the party wherein to amend, as often as he pleases. The ancient mode of pleading seems to have been brought back by the institution of this court. It is said that anciently, "all pleas were *ore tenus*, at the bar, and then, if any error was spied in them it was presently amended." (l) But this power at the common law was confined to the term at which the proceeding took place, and consequently could not be exercised after continuance, (m) which answers to the adjournment of a justice.

The power of a justice to allow an amendment in certain cases of variance, may or may not be exercised; for he is sometimes authorized by statute instead of going through with the formality of amending, to disregard certain variances upon the trial of the cause. (n)

Amendment of process.—This cannot be done by altering the return day; vid. ante, 1106, § 3, for this would mislead the party. But process may be amended for any defect of form, even after judgment. Id. § 1, 4. Thus, if a clerical mistake has been made in the date, direction, &c. of the summons, warrant or attachment, by which no injury has been caused to either party, it may be amended by the justice; and if not done before judgment, it may be afterwards. So that for such a formal defect, if amended after judgment, the judgment would not be reversed, even though an objection is made at the trial; indeed, under § 7, cited

(k) 10 Mod. 88. 2 Caines, 233, and vid. 2 R. S. 276, § 18, 19, 20. Vid. also § 2, cited ante, 1106.

(l) 10 Mod. 88.

(m) 8 Co. 157, and vid. 15 John. 304.

(n) Vid. ante, 923, 4, 989.

ante, 1107, it might be entirely disregarded by the court of review, although not amended by the justice. Thus, suppose a justice living in *Saratoga* county, should, by mistake, direct his process to any constable of *Washington* county, this might be amended, the rest of the process being full and significant.(o) So, if a justice should omit to state in an attachment the amount of debt sworn to by the applicant.(p) So, where there is more than twelve days, between the date and return of summons, provided it, in fact, issued on the right day.(q) For when a justice is directed to make out process, this contains an implied instruction to make it out correctly.(r) And process issued against A. and B. joint debtors, and served only on A., the real debtors being A. and C., may be amended by inserting C's. name instead of B., so as to make the process run against A. and C., instead of A. and B.(s) And, in one case, in the English court of common pleas, the defendant, whose real name was *Augustus Richard Butler Danvers*, was arrested on a *capias*, (which answers to a justice's process to bring the defendant into court,) by the name of *George Augustus Richard Danvers*, it appearing that the plaintiff had the right name, by an affidavit which he had drawn in order to hold the defendant to bail, and the mistake in the name, consequently, being merely that of the clerk, the court amended the writ, by making the name right, even though the bail were concerned in the proceeding.(t) This was after service of the *capias*, and on exception taken by the defendant. In an earlier case, in the same court, the defendant pleaded a misnomer in abatement, but, it appearing that the right name was given to the clerk, to make out the writ by, the mistake was amended.(u) And in a case in a justice's court, where the name of one of the plaintiffs was wrongly stated in the summons, it was held that it might be amended, after return, by striking out the word *Joseph* and inserting *Jasper*.(v) In the King's Bench, the writ was in *debt* only, whereas, according to the forms of the court, it should have been *trespass* and also *debt*. The court, on exception taken, ordered *trespass* to be inserted.(w) Suppose a summons, instead of being, to appear before P. G., at his office in the town of *Saratoga Springs*, should be, at his office, the town of *Saratoga Springs*, omitting the word *in*: this, or any, the like trifling mistake of the justice, might be amended, on exception being taken.(x) Judgment against *Edward*,

(o) 17 John. 68.

(p) 14 Wen. 230. Ante, 490.

(q) 3 Wils. 454. 2 Blac. R. 918.

(r) Id.

(s) 7 T. R. 295.

(t) 2 Bos. & Pull. 109.

(u) 2 Ventris, 46.

(v) 10 Wen. 213. Vid. ante, 408, 535.

(w) 1 Bl. R. 462, and vid. ante, 469, 587.

(x) Cro. Eliz. 644.

and the execution against *Edmund*, by mistake : the English court of common pleas ordered the execution to be amended, by substituting *Edward* for *Edmund*, so as to make it agree with the judgment.(y) In a case in the King's Bench, the defendant, whose real name was *Maurice Jacob Hertz*, was sued by the name of *Moses Isaac Hertz*. He pleaded this misnomer in abatement, and the court ordered the writ to be amended, so as to be in the right name, though the counsel insisted, that this would do away all pleas of misnomer, and in the argument of that cause, the cases, as to amending mistakes in names, are very fully cited by the attorney general and *Marryat*.(z) Where there is a non-joinder of defendants in the summons, &c. which is pleaded in abatement, this cannot be amended by adding a name.(a) As to the jury process, or *venire*, if it be of the proper place, the proper action, and between the proper parties, all other faults may be amended.(b) And a wrong christian name or surname, in the panel, may be amended, if proved to be the man intended.(c) A direction of the *venire* to an improper officer, if the *venire* be executed by the proper officer, will be aided after verdict.(d) And the supreme court have laid down the general rule, that irregularities in the contents or in the execution of jury process, are amendable.(e) The execution may be amended by altering the sum, so as to make it agree with the judgment.(f) So, the return of an officer to an execution, may be amended, according to the fact.(g) An execution burnt, or otherwise destroyed by accident, may be supplied by a new one.(h) An execution tested after the plaintiff's death, may be amended.(i) So, it may be amended, by adding the name of a plaintiff, and correcting the name of the place at which it was issued.(j) But it can, in no case, be amended after it has been executed.(l)

Amendment of pleadings.—Something was said on this subject, ante, 923, 4, 989, 990. Vid. also 15 Wen. 542. A clerical mistake, by which the cause of action is laid after the commencement of the suit, may be amended.(k) So may a defect in misdescribing notes, in a declaration in trover.(l) (Amendment granted upon terms, it appearing that the de-

(y) Barnes, 10.

(z) 3 Maule & Selw. 450.

(a) 8 Cowen, 122. Vid. 1 Wen. 71.

(b) Bac. Ab. tit. Amendment, (D) 4. Vid. 4 Cowen, 550.

(c) Id. and cases there cited, n. (b)

(d) Id. 13 John. 227.

(e) Per Kent, C. J. 1 Caines, 587.

(f) 5 John. 89. 3 Caines, 98. Vid. 13 Wen. 29.

(g) 5 John. 163. Vid. Dalt. Sh'ff, c. 41, and cases there cited.

(h) 3 John. 448.

(i) 1 Cowen, 33.

(j) Id. 413. Vid. 2 id. 454.

(l) 5 Wen. 276.

(k) 2 Cowen, 515.

(l) 7 id. 517.

fendant's reliance upon the variance had caused a want of preparation for trial.) (m) A declaration in an action of assumpsit, for money had and received, brought by executors, counting upon promises to the testator, was held to be amendable after trial, by permitting the plaintiffs to allege the promises to have been made to them as executors, special circumstances appearing to warrant it. (n) The defendant may amend, by *adding a plea* after issue joined, upon terms; (o) or by giving notice of special matter; (p) but he cannot amend by adding a plea of the statute of limitations. (q) Where a plaintiff went to trial without interposing a replication to the defendant's plea, this was allowed to be amended after verdict. (r)

Amendment of verdict and judgment.—If the justice make a mistake in entering the verdict, he may correct his entry, by making it agree with the real verdict; as if he mistake the amount; or, where the verdict is for the plaintiff on one count, and for the defendant on another, and the justice enters for the plaintiff or defendant generally; and so in like cases. (s) In courts of record, the final judgment may be amended, in respect to a mere miscast in the amount of damages or costs; (t) but in a recent case, where a justice, after having entered in his docket, the amount for which he had rendered judgment, and informed the parties, it was held that he had no power to *reduce the amount*, on discovering that he had made a mistake in adding up the several items which he considered the plaintiff entitled to recover. (u)

(m) And vid. 10 Wen. 604.

(n) 20 id. 668.

(o) 15 Wen. 557.

(p) 4 Cowen, 555.

(q) 1 Wen. 302.

(r) 4 Cowen, 394, 395, note (a).

(s) Vid. Bac. Abr. tit. Amendment, (D) 5, and the cases there cited. Vid. also 8 Cowen, 623. 12 Wen. 215. But vid 19 id. 627.

(t) 3 Buls. 114. Vid. 18 Wen. 558.

(u) 18 Wen. 558. Ante, 1022.

APPENDIX.

THE following acts of the legislature were passed since a greater part of the foregoing work to which they relate, had gone to press. I therefore insert them here, with the pages containing the heads to which they belong. It will be seen, that the first, is a mere extension of the justice's jurisdiction to *one hundred dollars*. It went into effect on the 14th of July, 1840.

An act concerning justices' courts. (Vid. Sess. Laws of 1840, p. 265, 6, 7.)

[Passed May 14, 1840.]

§ 1. Sections second and third, of article first, of title fourth, of chapter second, of part third of the revised statutes, (vid. 2 R. S. 158,) are hereby amended so as to read as follows :

§ 2. Every such justice shall have jurisdiction over, and cognizance of, the following actions and proceedings :

1. Actions of debt, covenant and assumpsit, wherein the debt or balance due, or the damages claimed, shall not exceed *one hundred dollars*. *Vid. ante*, 29.

2. Actions of trespass and trespass on the case, for injuries to persons or to personal or real property, wherein the damages claimed, shall not exceed *one hundred dollars*. *Vid. ante*, 29.

3. All actions for any penalty, not exceeding *one hundred dollars*, given by any statute. *Vid. ante*, 27.

4. All actions commenced by attachment of property, as herein-after provided, wherein the debt or damages claimed, shall not exceed *one hundred dollars*, and to take and enter judgment on the confession of a defendant, where the amount confessed shall not exceed *two hundred and fifty dollars*.

§ 3. When there shall be a bond with a penalty exceeding *one hundred dollars*, with condition for the payment of a sum of money, not exceeding *one hundred dollars*, or for the payment of several sums of

money by instalments, the aggregate of which instalments shall not exceed *one hundred* dollars, an action of covenant may be maintained on such condition in a justice's court, and a recovery for either of such instalments shall not bar a subsequent suit for the other instalments or either of them. *Vid. ante*, 30.

§ 2. Section two hundred and ninety three, of title four, of chapter second, of part third of the revised statutes, (Vid. 2 R. S. 202,) is hereby amended so as to read as follows :

§ 293. In addition to the cases in which suits may now be commenced before justices of the peace by attachment, any suit for the recovery of any debt or damages arising upon any contract, express or implied, or upon any judgment for *one hundred* dollars or less, may be so commenced whenever it shall satisfactorily appear to such justice, that the defendant is about to remove from the county any of his property with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of or secrete any of his property with the like intent, whether such defendant be a resident of this state or not. *Vid. ante*, 472, 482, 488.

§ 3. Sections fifty two, fifty three and fifty eight, of said article fourth, title fourth, chapter second, of the third part of the revised statutes, (Vid. 2 R. S. 166, 167, 168,) are hereby amended so as to read as follows :

§ 52. If the amount of the set-off duly established, be equal to the plaintiff's debt, judgment shall be entered for the defendant with costs ; if it be less than the plaintiff's debt, the plaintiff shall have judgment for the residue only, with costs ; if it be more than the plaintiff's debt, and the balance found due to the defendant from the plaintiff in the action, be *one hundred* dollars or under, judgment shall be rendered for the defendant, for the amount thereof with costs, and execution shall be awarded, as upon a judgment in a suit brought by him ; but no such judgment shall be rendered against the plaintiff, when the contract, which is the subject of the suit, shall have been assigned before the commencement of such suit, nor for any balance due from any other person than the plaintiff in the action. *Vid. ante*, 745.

§ 53. If the balance found due the defendant, exceeds *one hundred* dollars, the court shall set off so much of the defendant's demand against the plaintiff's debt as will be sufficient to satisfy it, if required to do so by the defendant, and shall render judgment for the defendant for his costs ; but if the defendant shall not require such set-off, the justice shall enter judgment of discontinuance for the defendant with costs, and the defendant may thereafter sue for and recover his demand in any court having cognizance thereof. *Vid. ante*, 745, 6.

§ 58. But the last preceding section shall not extend to the following cases:

1. When the set off shall be *one hundred* dollars more than the judgment which the plaintiff shall have recovered.
2. When the set-off consisted of a judgment in favor of the defendant, or belonging to him, rendered before the commencement of the suit in which the same might have been set off.
3. When a set-off shall have been claimed by him, and a balance exceeding *one hundred* dollars shall have been found in his favor, the defendant may maintain an action for such part of his demand as was not allowed to him as a set-off.
4. When the suit was commenced by attachment, and the defendant did not appear in the suit.
5. Claims for unliquidated damages which could not be set off on the trial of the cause according to the preceding provisions.
6. Claims in suit in any other court, at the time of the commencement of the action before the justice's court. *Vid. ante*, 749.

The following act took effect immediately upon its passage.

An act to abolish the office of commissioners of deeds, &c. and to devolve their powers and duties on justices of the peace. (Vid. Sess. Laws of 1840, p. 187, 8.)

[Passed May 7, 1840.]

§ 1. The office of commissioner of deeds is hereby abolished in the several towns of this state; and all the powers and duties of such commissioners (1) shall hereafter be executed by the justices of the peace in said towns respectively; but the several commissioners now in office may continue to execute the duties of said office till the expiration of the term for which they were respectively appointed, and no longer. *Vid. ante*, 429, 30, 31, 930.

(1) The powers and duties of commissioners of deeds as conferred by the revised statutes, vid. 2 R. S. 211, § 41; id. 213, § 50; id. 325, § 74, are, to take the proof and acknowledgment of conveyances of real estate, and of every written instrument, except promissory notes and bills of exchange and last wills and testaments; and to take the discharge of mortgages; to take the acknowledgment of bail in actions in the supreme court, and in the common pleas of the county for which they are appointed; to take the acknowledgment of satisfaction of judgments in the supreme court, and court of common pleas of their county; and to take oaths and affidavits in any cause or proceeding, (except oaths to jurors and witnesses in the trial of a cause, oaths of office, and such other oaths as are required to be taken before particular officers.)

§ 2. It shall not be lawful for the said justices of the peace to take or receive, for the acknowledgment or proof of deeds, any further or higher fees than the following, viz :

For taking the proof or acknowledgment of a deed, and drawing and signing the certificate, for one person, twenty-five cents : For each additional person having executed the same deed, twelve and a half cents : For swearing each witness, six cents.

A few of the following cases were omitted, by mistake, in the preceding volume, but have mostly been reported since that part of the work, to which they relate, had gone to press. I therefore give them here, with the pages containing the heads to which they belong.

Ante, pp. 47, 244, 5. A guaranty of a debt in the form of an endorsement of a promissory note, is obligatory upon the guarantor ; and in case of non-payment by the debtor, the guarantor is liable for the whole amount of the debt, and not merely for the sum received by him, with the interest thereof. 21 Wen. 588. A promise or obligation cannot be defeated in whole or in part, on the ground of the *inadequacy* of the compensation received for the obligation incurred. The slightest consideration is sufficient to support the most onerous obligation. The meaning of the rule that you may impeach the consideration, is only, that you may show *fraud, mistake or illegality* in its concoction, or *non-performance* of the stipulations of the agreement on the part of the promisee. *Id.*

Ante, p. 48. The release of a lien obtained by the levy of an attachment, is a good consideration for the promise of a third person to pay the debt of the defendant in the process. 20 Wen. 184. An agreement to *forbear to sue* a debtor, is a good consideration for the promise of a third person to pay the debt ; but to render the promise obligatory, it should be in writing. *Id.* 201.

Ante, p. 49. Where a contract was made between a miller and other persons, for the manufacture of wheat into flour, he engaging, on his part, for every four bushels and fifty-five pounds of wheat received, to deliver one barrel of superfine flour, and there was no stipulation that the wheat delivered should be kept *separate* from other grain,

or that the *identical wheat* should be returned in the form of flour; it was held, that the transaction between the parties constituted a *sale*, and not a *bailment*, and that the owners of the wheat could not maintain an action for the conversion of the flour manufactured from the wheat. 21 Wen. 83.

Ante, pp. 50, 51. Where a contract is made for the sale of an article of merchandize at a stipulated price, although the contract be void, under the statute of frauds, the *price* agreed upon may be recovered, if the article be subsequently delivered and accepted. A *subsequent acceptance*, in whole or in part, renders the contract valid; though it seems it is not so, as to the payment of earnest money—that must be paid at the time of making the contract. 20 Wen. 61.

Ante, p. 56. Stage-coach proprietors are answerable as common carriers, for the baggage of passengers; they are regarded as insurers, and must answer for any loss not occasioned by *inevitable accident*, and the *public enemies*. The fact that the owner is present, or sends his servant to look after the property, does not alter the case, where there is no fraud on the part of the owner. 19 Wen. 234. Stage-coach proprietors, and other common carriers, cannot restrict their common law liability, by a general notice that the "*baggage of passengers is at the risk of the owners*." If a carrier can restrict his common law liability, it can only be by an express contract; as a contract cannot be implied or inferred from a general notice, though brought home to the knowledge of the owner of the property. *Id.* *Vid.* also 21 Wen. 153. *Id.* 354. Common carriers, who carry passengers and their baggage as well as merchandize, are answerable under their common law liability for the baggage of passengers left at their offices in charge of their agents, with the intention of proceeding with the same in the next train of cars, steam-boats, or other conveyances departing from the place where the baggage is deposited. *Id.*

Ante, p. 59. A common carrier remains liable until the actual delivery of goods to the consignee; or if the course of business be such that delivery need not be made to the consignee, his liability continues until *notice* of the arrival of the goods be given. The carrier may, however, show that the uniform custom is to leave goods *without notice*. 17 Wen. 305. An inn-keeper is responsible for the safe keeping of a load of goods belonging to a traveller who stops at his inn for the night, if the carriage containing the goods

be deposited in a place designated by the *servant* of the inn-keeper, although such place be an *open, unenclosed space*, near the public highway. 21 Wen. 282. In an action against the owners of a steam-boat, as common carriers, where the boat stranded in entering a harbor in the night time, in consequence of the master mistaking a light upon a stranded vessel for a light usually exhibited by the keeper of the beacon light, by means whereof the plaintiff sustained damage in the loss of goods on board the vessel; it was held, that nothing will excuse the common carrier, except the two ordinary cases, viz. *inevitable accident without the intervention of man*, and the *acts of public enemies*; that neither of the exceptions existed in this case; and that proof of the utmost vigilance and care, on the part of the master, was irrelevant and inadmissible as a defence to the action. 21 Wen. 190. The rule of law is the same in respect to a *carrier by water*, as to a *carrier by land*; nor is there any distinction whether the navigation be upon the *ordinary rivers*, or the *great rivers and lakes*, or *inland seas* of this country, except so far as the exceptions in favor of the carrier are extended to the *perils or dangers of the rivers or lakes* by the special terms of the contract contained in the charter-party or bill of lading. *Id.* *Vid.* also 19 *id.* 329.

Ante, p. 61. Where a debtor admits, to a third person, an existing balance due from him on a bond or other chose in action, and, upon the strength of such admission, such person takes an assignment of the instrument, the debtor, in a suit subsequently brought for the recovery of such balance, is estopped from showing a claim against the original creditor, for the purpose of reducing the amount of the recovery, although the assignment was taken for a precedent debt. 21 Wen. 94. *Vid.* *id.* 172.

Ante, p. 81. Where parties enter into a contract under seal, in their *individual characters*, not describing themselves as *trustees, agents*, or a *committee*, they are *personally responsible*, although they in fact contract as a committee, in anticipation of the incorporation of a literary institution. *Parol proof* is not admissible, in such case, to show that it was not intended they should be personally liable. 21 Wen. 101.

Ante, p. 83. Where a quantity of butter was put into the hands of an agent, who was proceeding to the city of New-York to sell, with directions *to do the best he could with it; to do as well with it as if it*

was his own; and the agent after endeavoring in vain to dispose of it in New-York at a fair price, sent it, *together with his own*, to a southern market, it was held, that the question whether this was or was not an excess of the agent's authority was a question for the jury to decide, upon evidence as to the usual course of business in relation to such matters. 21 Wen. 610. Ordinarily, an action of trover will not lie by a principal against his agent, unless it appear that the agent has converted the property of his principal to his own use, or disposed of it contrary to his instructions; there must be some *act* of the agent; a mere *omission of duty*, is not enough, though the property be lost in consequence of the neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. *Id.*

Ante, pp. 86, 87, 90. Where three persons ran a line of stage coaches from *Utica* to *Rochester*, the route being divided between them into three sections, the occupant of each furnishing his own carriages, horses, and drivers, and paying the expenses of his own section, but the *money received as fare was divided among the parties* in proportion to the length of each one's route; it was held, that they were jointly liable, as *co-partners*, to a third person, for an injury sustained by being thrown from a wagon which came in collision with the coach of one of them, through the negligence of his driver. 18 Wen. 175. It seems, that a party connected with a partnership, who receives a compensation for his services, graduated by the profits of the business, is not a partner even as to third persons. *Id.* *Vid.* also 19 *id.* 329. In case of the dissolution of a co-partnership, actual notice of the dissolution must be brought home to persons with whom the firm has had dealings, to protect, *as to such persons*, one partner from the acts of another, after dissolution. 22 Wen. 182. As to what amounts to *actual notice*, *vid. id.* It seems, that the acceptance of a note from one of several partners, for a debt due from the firm, in lieu of the firm note previously given, will not discharge the other partners, unless there be evidence that such was the intent of the transaction; and that, the new note remaining unpaid, the creditor may recover his debt under the *common counts*, in an action against all the members of the firm. *Id.*

Ante, p. 90. All the partners of a firm are bound by a note made by one of the partners in the name of the firm, *for his individual benefit*, even though it be fraudulently put into circulation as it respects

himself, if the note, before maturity, comes into the hands of a *bona fide* holder. 20 Wen. 251.

Ante, p. 91. Although one partner cannot bind his co-partner by *seal*, where the effect of the instrument thus executed is to *charge* the firm, yet he may, by an instrument *under seal*, authorize a third person to discharge a debt due to the firm. 20 Wen. 251.

Ante, p. 93. *General reputation of a partnership*, standing alone, and not offered in corroboration of *facts and circumstances*, is not enough to prove the existence of a partnership; and it is doubtful whether proof of *general reputation* is admissible, even as auxiliary evidence. 20 Wen. 81. The judgment of the supreme court in this case was reversed by the court for the correction of errors, but upon a different point. The chancellor in his opinion concurs with the supreme court, and Mr. Senator Edwards dissents, in regard to the rule above laid down, which was incidentally discussed. *Vid.* 22 Wen. 264.

Ante, p. 104. Where goods are to be paid for in a note or bill, the vendor cannot recover on the *common count for goods sold, &c.* until the *credit has expired*; but he may proceed *immediately*, for a breach of the special agreement. 21 Wen. 175. *Vid. id.* 90.

Ante, p. 127. Where a contract was made for the sale and delivery of oats, and the parties, *upon a mistaken state of facts*, estimated the quantity at a certain number of bushels, for which the stipulated price was paid; it was held that the purchaser might recover back money paid for the *difference* between the *estimated* and *real* quantity; and that, notwithstanding he had agreed to take the oats at the estimated quantity, *hit or miss*. 20 Wen. 174.

Ante, p. 165. It is said at this page, that an infant cannot be a party to a bill or note, his engagement being *void*. The rule is otherwise: his bill or note is merely *voidable*. *Vid. ante*, 265, 703, &c.

Ante, pp. 169, 127. Where one of the makers of a note, on its being presented to him by a person about to take a transfer of it, acknowledges himself to be holden for its payment, and the note is purchased for value, and the one who made the acknowledgment subsequently makes a payment upon it, he cannot afterwards sue to re-

cover back the money thus paid, although he shows that he signed the note as *surety*, that it was paid by his principal, and that it was *over due* when transferred, and that he made the acknowledgment *in ignorance of the payment* by the principal. 21 Wen. 172.

Ante, p. 170. Where an absolute guaranty is endorsed upon a note payable to A. B. or bearer, at the time the note is made, and the note and guaranty are transferred by the payee, the assignee may maintain an action *in his own name*, against the guarantor, without showing demand and notice. Otherwise, it seems, where the endorsement is in blank. 19 Wen. 202. Vid. also 21 id. 588, as to the liability of the guarantor. Where a note is transferred by the payee, who agrees to repay the sum paid for the note by the transferee, in case the note cannot be collected of the maker by *due course of law*, and further agrees, in such case, to pay the costs of a suit instituted to collect it, it is no excuse for a neglect to attempt the collection, that the maker of the note was insolvent. 21 Wen. 255.

Ante, p. 182. The holder of *negotiable* paper may bring an action on it in the name of a person having no interest in it; and it is no defence that the suit is brought without the knowledge, assent or authority of the nominal plaintiff. 15 Wen. 640.

Ante, p. 194. An action does not lie on a *bank check* against the *drawer*, until after *notice* of presentment and non-payment. 21 Wen. 372. Vid. this case at large, as to the degree of diligence necessary on the part of the holder, in making presentment of a *check*, and giving notice of non-payment, and also as to the distinction between *bank checks* and *bills of exchange*. Vid. also 20 Wen. 192, which contains much useful doctrine in regard to the law applicable to checks.

Ante, p. 197. To charge the endorser of a *post-dated bank check*, falling due on Sunday, (*the day of its date*,) presentment for payment must be made on the next day, and notice of non-payment given to the endorser; presentment on Saturday, the day preceding its maturity, is a nullity, and discharges the endorser. 20 Wen. 205. Where the day of performance of contracts, other than instruments upon which *days of grace* are allowed, falls on *Sunday*, that day is not counted; and compliance with the stipulations of the contract on the next day, is deemed in law a performance. Id.

Ante, p. 198. A bill of exchange imports that a debt is due from the drawee to the drawer, which is assigned to the payee of the bill; and if the drawee accept it, this is an acknowledgment on his part, that he has funds of the drawer in his hands, to the amount of the bill. When the bill is paid and taken up by the drawee, it ceases to be obligatory upon any of the parties. The presumption that the drawee has funds of the drawer, may, however, be rebutted. The drawee may show that he accepted and paid the bill for the accommodation of the drawer; and then, in the absence of any express stipulation, the law will imply an undertaking on the part of the drawer to indemnify the drawee, who, *on this implied obligation*, may have an action against the drawer; *but not on the bill*. 21 Wen. 502. Where a third party subscribes his name under that of the drawer of a bill, adding the word *surety*, to his signature, the undertaking of such third party is with the payee or subsequent holder, that the bill shall be accepted and paid; but he incurs no obligation to the drawee. *Id*.

Ante, p. 204. Notice of protest sent by mail to the town where the party resides, is sufficient, although there be several post-offices in the same town, unless it appear that the holder knew that it should be directed in a different manner; or now, *by statute*, (Sess. Laws of 1835, p. 152,) unless the party, when affixing his signature to a bill or note, specifies thereon the post-office to which notice must be addressed. 21 Wen. 10. Where the sum specified in a notice of protest varies from the true sum, it is for a jury to say, whether a party has or has not been misled. *Id*.

Ante, p. 206. An agent receiving for collection, before maturity, a bill payable on a particular day after date, is held to strict vigilance in making presentment for acceptance; and if chargeable with negligence, is subject to the payment of all damages sustained by the owner; but the agent may show circumstances tending to mitigate damages, or to reduce the recovery to a nominal amount. 20 Wen. 321.

Ante, p. 212. Where there are three consecutive endorsers to a promissory note, the *release* by the plaintiff of the *first* endorser, operates as a release of the others. 21 Wen. 108.

Ante, p. 217. It is said at this page, that if a *surety* to a note request the creditor to sue the principal, and informs him that he does not wish to stand as surety any longer, and the creditor delays to sue, till the principal becomes insolvent, the surety is *not thereby discharged*. This is the law in most of the states except our own, and we inadvertently omitted to notice the case of *Warner v. Beardsley*, 8 Wen. 194, which, in connection with the cases cited and commented upon by the chancellor, at page 198, &c. establishes a contrary doctrine. However, in the case last cited, the rule is laid down with this qualification, that in order to discharge the surety, on the ground of a delay to prosecute after request to do so, it must appear that the principal was solvent when the request was made, *within the state*, and that the creditor, *without any reasonable excuse*, neglected or refused to proceed until the principal became *insolvent*.

Ante, p. 242. Contracts in restraint of trade, which *totally* prohibit the pursuit of an occupation, or the carrying on of a particular business, *at any place in the state*, are *void*, as detrimental to one party, without being beneficial to the other, and also as injurious to the public, let the consideration moving to the contract, be what it may; but contracts for a *limited restraint*, as that a man will not exercise his trade or carry on business in a *particular place*, or within *reasonable limits*, are valid, and will be enforced by the courts, if it be shown that they were entered into for good reasons. And it seems, that it is not enough that there be a consideration such as would uphold a contract in which the public have no interest; but that whatever may be the pecuniary consideration, it must appear, in addition, that there was some *good reason* for entering into the contract, and that it imposes no *restraint* upon one party, which is not *beneficial* to the other. What are good reasons, must depend, in a great degree, upon the *nature of the trade or business* to which the contract relates. 21 Wen. 157, 8. Vid. the opinion of Bronson, J. at large. Vid. also *id.* 166.

Ante, p. 244, 5. In an action on a promissory note, given in pursuance of a covenant, the maker cannot impeach the consideration; but if within the equity of the statute cited *ante*, p. 49, 268, note (1), allowing the consideration of a *sealed* instrument to be enquired into, the maker cannot avail himself of the defence, unless he has pleaded or given notice of it. 21 Wen. 626. Where a party obtains what he contracted for, he cannot avoid his contract on the ground

that what he received was *valueless*, unless he shows *fraud* or a *misapprehension* in respect to the subject matter of the contract. *Id.*

Ante, pp. 280, 282. An agreement to forbear to sue a debtor, is a good consideration for the promise of a third person to pay the debt; but to render the promise obligatory, it must be in writing. 20 *Wen.* 201. *Whilst the debt remains a subsisting demand against the original debtor, the promise of a third person is collateral, and must be in writing.* *Id.* *Vid.* the opinion of Nelson, C. J. at pp. 203, 4, where he comments upon the case of *Farley v. Cleveland*, 4 *Cowen*, 432; 9 *id.* 630, cited *ante*, p. 280.

Ante, p. 284. An auctioneer who sells stolen goods, is liable to the owner, in an action of trover, notwithstanding the goods were sold, and the proceeds paid over to the thief, *without notice of the felony*. The exception of sales in *market overt*, which prevails in England, is not recognized here. 20 *Wen.* 21. Affirmed in the court of errors, 22 *id.* 285. Where goods are obtained by a purchaser by making *false representations* as to his pecuniary condition and ability to pay, and by suppressing the truth in those respects, the vendor may rescind the sale, and, after demand and refusal, bring an action of trover against a sheriff who has levied upon the goods by virtue of an execution against the purchaser. 20 *Wend.* 167. *Vid.* *ante*, p. 1066.

Ante, p. 295. It was said at this page in substance, that if a person having a lien upon goods part with the possession of them, his lien is gone. Such is the general rule, especially if he deliver the goods to the general owner, but it was held in 19 *Wen.* 431, that a party having a lien upon goods may transfer the possession, *subject to the lien*, to a third person, who may lawfully hold the property until the lien is discharged; but if the transferee *sell* the goods, the owner is remitted to his original rights, freed from the lien, and may bring *trover* against the transferee. Trespass is not the proper action.

Ante, p. 299. It seems that were a lien upon goods exists, and the party, when demand of the goods is made, asserts his right to hold as *purchaser*, and *not* on account of the lien, that he cannot, in an action brought against him, protect himself under the lien. 20 *Wen.* 268. A tender of charges must be made before suit, when a lien exists, unless the goods have been parted with; in which latter case, all that can be claimed by the defendant, is a mitigation of damages by way of deduction or *recoupment*. *Id.*

Ante, p. 300. Trover may be maintained by one tenant in common against his co-tenant, where the latter *sells* the whole property held in common, *although it be not removed beyond the reach of the plaintiff*; he may take possession of the property when opportunity offers, but he has an election to do so, or to bring trover. 21 Wen. 72. Vid. 15 John. 179, *contra*, not noticed in the case just cited. But vid. also 15 Mass. R. 82, which agrees with the case in Wendell.

Ante, p. 300. In trover or trespass, if goods be taken by a stranger, the *special-property-man* may recover the *whole value*, holding the balance, beyond his own interest, in trust for the *general owner*; but if the suit be against the latter, he is entitled to a deduction of the value of his interest. 21 Wen. 301.

Ante, p. 306. Where a child of such tender age as not to possess sufficient discretion to avoid danger, is permitted by his parents to be in the highway without any one to guard him, and is there run over by the carriage of a traveller and injured, no action lies against the traveller, unless it is shown that the injury was *voluntary*, or arose from *culpable negligence* on his part. In an action for such injury, if there be *negligence* on the part of the plaintiff, there cannot be a recovery; and although the child, by reason of its tender age, is incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care *on the part of the parents or guardians* of the child, furnishes the same answer to an action by the child, as would its omission on the part of the plaintiff in an action by an adult. And it seems, that the same rule would apply in an action by a *blind* or *deaf* man, or a person *non compos*, who, under similar circumstances, received an injury on the highway. For an injury to a child of the most tender age, an action may be brought in the name of the child; but the better opinion is that, in this state, the action need not, necessarily, be in the name of the child; it may be in the name of his parent or guardian. 21 Wen. 615.

Ante, p. 308. An action on the case does not lie against a master and servant jointly, for a *wilful injury* done by the servant while driving the master's carriage, if such carriage be not employed in the *conveyance of passengers*, (1 R. S. 693, § 6,) and the master be not present when the injury occurs. If the injury be occasioned by the *negligence* or *want of skill* in the servant, a joint action lies against the master and servant. The doctrine of *Judge Reeve*, in his treatise

tise on *domestic relations*, which extends the master's liability to *wilful injuries* of the servant, denied. 19 Wen. 343.

Ante, p. 315. Although, by the terms of a contract, an article agreed to be delivered is to be of a *merchantable quality*, still, if an inferior article be delivered and *accepted*, the purchaser, when called on for payment, is not entitled to a reduction from the contract price, on the ground of the inferior quality of the article; he must refuse to accept it, or, if its inferiority be subsequently discovered, he must return it, or require the purchaser to take it back. 20 Wen. 61.

Ante, p. 339. Where a magistrate, on complaint of a violation of the statute for the observance of Sunday, issued a warrant, had the person complained of arrested, and imposed a fine on him; it was held, that the justice was not liable in an action of trespass, although he might have misjudged as to the facts alleged being an offence within the meaning of the statute. The complaint was, that the party, "on the first day of the week called Sunday, circulated a memorial to the legislature," without stating the purport or object of the paper circulated. It was also held, that the constable executing the warrant was not liable in trespass. 21 Wen. 552.

Ante, p. 343. A man may keep a dog for the necessary defence of his house, his garden or his fields, and may cautiously use him for that purpose in the *night time*; but if he permit a mischievous dog to be at large on his premises, and a person is bitten by him in the *day time*, the owner is liable, though the person be, at the time, *trespassing* on the owner's grounds. 17 Wen. 496.

Ante, p. 354. An action on the case may be maintained by a father, for the seduction of his daughter, without proving any *actual loss of service*; it is enough that the daughter be a minor, residing with her father, and that he has the *right to claim* her services. 21 Wen. 80.

Ante, p. 374, &c. Any person *occupying* land, and interested in the *making* and *maintaining* a division fence, is entitled to avail himself of the provisions of the statute in reference to division fences; the remedy is not limited to the *owner* in fee. 17 Wen. 320. This case is to the same point with the case cited in note (m), *ante*, 376.

Ante, p. 375. The amendatory act of 1838, cited at this page, which relates to the liability of the owners of adjoining lands, for damages arising from the defect of division fences, was passed after the decision of the case of *Clark v. Brown*, by the court of errors, 18 Wen. 213. That case, however, contains much useful doctrine in regard to this subject, and the reader would do well to consult the opinions of the Chancellor and Mr. Senator Willes, at large.

Ante, pp. 449, 450. A joint action does not lie against *separate owners of dogs*, by which sheep are killed. The action should be against *each owner separately*, and the recovery, to the extent of the damage done by his own dog. 17 Wen. 562.

Ante, p. 482. An affidavit to obtain an attachment is good, although the applicant swears only to his *belief* as to the *intent*, provided he sets forth the *facts and circumstances* upon which such belief is founded. 20 Wen. 145.

Ante, p. 489. An attachment bond extends to the final determination of the cause; and although the plaintiff recover a judgment before the justice, yet if the judgment be reversed, he and his surety are liable upon the bond. 21 Wen. 270.

Ante, p. 505. On its appearing that a party who has been arrested on a warrant, is not subject to arrest under the non-imprisonment act, the justice should dismiss the proceedings, although instituted upon proper proof. And it seems, that in an action against two, where both are arrested, one of them not being subject to arrest, the party entitled to exemption from arrest may be discharged. 21 Wen. 457.

Ante, p. 518. Where property is taken under an attachment, the lien created thereby continues, notwithstanding the giving of a bond by the debtor for its production, until the issuing of an execution, and a reasonable time thereafter to make a levy. But if, in the mean time, the property be removed by the debtor beyond the jurisdiction of the justice who issued the attachment, and it be there seized under another attachment, the lien is gone, notwithstanding the issuing of an execution under the first attachment; and the constable holding the latter execution, cannot maintain an action for the property. 20 Wen. 238. The decision in this case does not violate the

rule which forbids a levy upon property in the custody of the law, because the *lien* of the first attachment had ceased. *Id.* 240, 241.

Ante, pp. 635, 6. Where personal property, e. g. a boat, was sold under a *special contract*, containing specific provisions as to the mode and time of payment, and as to the vendor furnishing the purchaser with freight, it was held, that the property having been delivered to and used by the purchaser, and the plaintiff having performed all that he stipulated to do, an action might be sustained on the common counts in assumpsit for the price of the property, and that it was not necessary to declare *specially*. 22 Wen. 576. NOTE. On page 635, near the bottom, a reference is made to *ante*, 67 ; this is erroneous, it should be *ante*, 124.

Ante, pp. 705, 6. Long continued inebriety, although resulting in occasional *insanity*, does not require proof of a lucid interval to give validity to the acts of the drunkard, as is required where general insanity is proved. 22 Wen. 526.

Ante, p. 711. A contract *not under seal*, rescinding, upon certain terms, a former contract *under seal*, where the contract last made is fully executed, is valid ; but a specialty cannot be modified by a *parol* or *written unsealed executory agreement*. 21 Wen. 628. It is not indispensable to the validity of a contract, that the cause moving to the act should be mentioned as the consideration ; it is enough if, from the whole instrument, it be manifest that there is a consideration. *Id.*

Ante, p. 734. Where an action is brought for breach of a contract, whether sealed or not, and the defendant can show that the plaintiff has not performed the contract on his part, according to its terms or spirit, he may, at his election, either bring a cross action, or insist upon a *recoupment*, or deduction of his damages arising from the breach committed by the plaintiff, whether liquidated or not. But notice of this defence should be given with the plea. 22 Wen. 155. Vid. the concluding part of the opinion of the court in this case.

Ante, p. 776. Where there is a general submission to arbitration of all *claims and differences* relating to a mercantile partnership, the arbitrators ought not to open an account which has been settled previous to the submission, if objected to ; but if they do this, the award

cannot, for this reason, be set aside, under the statute. 17 Wen. 410. A submission by *two parties* on one side, and *one* on the other, includes the *joint* and *individual* demands of the two, against the other party; and if an award be made in pursuance of it, such award may be pleaded in bar to an action by one of the joint obligors against the other party. 19 id. 285. Vid. also 22 id. 125. The latter case decides, among other things, that where no time is specified for making the award, it may be made at any time.

Ante, p. 788. The absolute acceptance of the *note* of a third person from one of the members of a firm, endorsed by him, together with the payment in cash of the balance of the account against the firm, operates as a *payment* and *satisfaction*. 21 Wen. 450. Vid. this case at large. The remarks of Cowen, J. and the authorities cited by him in delivering the opinion of the court, relate to the subject discussed *ante*, p. 621, &c.

Ante, p. 807. Where an accountable receipt is given, by which the receiptor agrees to pay to A. the amount of a note to be collected by him, part in *cash* and part in *goods*, no *demand* of the goods is necessary, if the receiptor, after receiving payment of the note, insists upon applying the money to a demand owing to him by A. *and another person, jointly*. 22 Wen. 178.

Ante, p. 946. A declaration by a *partner*, though made during the existence of the partnership, that a liability incurred by a third person at his request, in the borrowing of a sum of money was for the benefit of the firm, is not binding upon his co-partner. Had a note been given in the *partnership name*, the rule would have been different; then the burthen would have lain upon the co-partner, to show that the note was given for the *individual* debt of the partner who gave it. 21 Wen. 365.

Ante, p. 995, 6. Where parties entered into a submission to arbitration, whereby it was agreed among other things that the award should be final, "*under the penalty of one hundred dollars, to be paid,*" &c. "*this being the stipulated damages agreed upon by and between the said parties;*" and the submission further contained a stipulation that one of the parties should give *notice of five days* to the other, of the time of the meeting of the arbitrators; it was held, in an action brought on the contract of submission, assigning as a breach the

omission to give such notice, that the sum mentioned in the agreement, could not be recovered as stipulated damages for such omission, and if the party was liable for the payment of such damages, it could be enforced only for not performing the award when made. And the court inclined to the opinion, that even in an action upon the agreement, for non-performance of the award, the sum specified in the submission would be considered as a *penalty*, and not as *liquidated damages*. In these cases the specified sum will not be held as liquidated damages, except where it is *manifest the parties so intended*, and where it is *difficult if not impossible, from the circumstances of the case, for a jury to arrive at a satisfactory conclusion as to the amount of damages to be allowed*. 22 Wen. 163.

Ante, p. 1001. Interest is recoverable in an action of debt on a judgment for costs in a suit for assault and battery. And it seems, that it is recoverable in an action of debt on judgment, whether the original demand carried interest or not. 22 Wen. 157.

Ante, pp. 1007, 1010. In an action on the case by a father for the seduction of his daughter, he may show, in aggravation of damages, any circumstances, being the natural consequences of the guilty act, although they did not transpire till after suit brought. 21 Wen. 79.

Ante, p. 1028. A party sued as a *public officer*, is entitled to *double costs*; and if the fact of his being so sued, does not sufficiently appear from the pleadings, the justice may, before rendering judgment, enquire, in the presence of the parties, into the defendant's right to such costs. 19 Wen. 351. The court in this case said, that although the statute prohibits a justice from giving judgment for more than five dollars costs, except where fees for foreign witnesses are charged, yet he may, where he is authorized to give judgment for double costs, add *one half* to the taxed bill, although the aggregate may in that case, exceed five dollars. Vid. id. 352.

Our books of reports abound with cases relating to the rules of pleading. A few of the most important have been cited under their appropriate heads. As this branch of the law is of minor importance, owing to the liberality with which pleadings in justices' courts are viewed, and as, moreover, the rules of pleading are uniform, and have undergone little or no alteration for a great number of years, it was thought advisable to pass over those parts of the treatise which relate to this subject, without making any considerable additions. For the same reasons, we omit to notice here, any of the recent cases belonging to this head.

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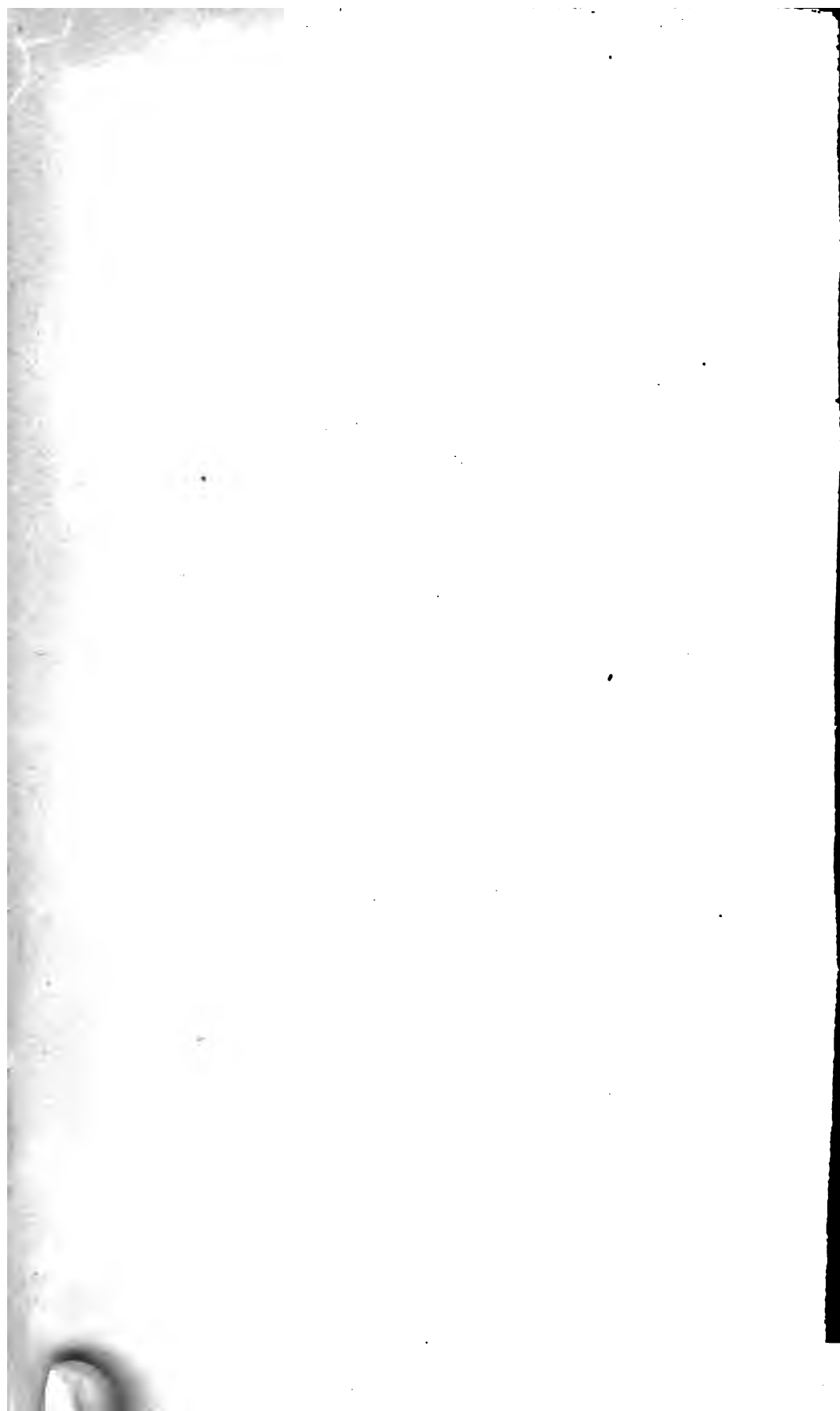
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